IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-927

ELEANOR E. HARRIS, ADMINISTRATOR OF THE ESTATE OF LEONARD JAMES HARRIS, DECEASED, AND ELEANOR E. HARRIS, INDIVIDUALLY,

Petitioner,

vs.

AMERICAN AIRLINES, INC., A NEW YORK CORPORATION,

Defendant,

and

FIREMAN'S FUND AMERICAN LIFE INSURANCE COMPANY, A CALIFORNIA CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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NO.

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The petitioner, ELEANOR E. HARRIS, Individually, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Seventh Circuit in favor of the defendant, respendent herein, Fireman's Fund American Life Insurance Company, a California Corporation. A Petition for Rehearing was denied. The cause of action pending against the American Airlines, Inc., a New York Corporation, is still pending in the District Court, Northern Division.

OPINIONS BELOW

On June 14, 1976, an opinion (dated June 10, 1976) was filed by the District Court granting summary judgment in favor of Fireman's Fund against the plaintiff [App'x. A1]. The Appellate Court affirmed on a ground different from the said Trial Court (in fact ignoring the Trial Court's Opinion). [App'x.A7]

JURISDICTION

The Judgment of the Court of Appeals was entered on August 30, 1977. A timely Petition for Rehearing was filed, then denied, on September 29, 1977 [App'x.A12] This Petition for Certiorari is filed within 90 days. This Court's jurisdiction is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED.

Can one Circuit of the United States Courts of Appeal render a decision founded on a local rule of civil procedure that obliterates a party's rights granted in the summary judgment section of the Rules of Civil Procedure for the United States District Courts (Rule 56) [App'x. A24], directly in conflict with decisions rendered by other Circuits of the United States Courts of Appeal and the Supreme Court of the United States?

STATEMENT OF THE CASE

ELEANOR E. HARRIS, widow and Administrator of the Estate of Leonard James Harris, filed a three-Count suit on the basis of diversity of citizenship [28 U.S.C., Sec. 41(1)] on November 27, 1974. A Complaint and First Amended Complaint were filed. The First Amended Complaint is material to this appeal. The First Amended Complaint herein contained two Counts against American Airlines: Count I charged the personnel of American Airlines [hereinafter referred to as the "airline"] caused the accidental death of said decedent on April 20, 1974, in violation of The Convention for the Unification of Central Rules Relating to International Transportation of Air (commonly referred to as the WARSAW Convention, with Amendments referred to as the Montreal Agreement). Article 17 (death caused by "accident")

provided as follows:

> "[Article 17] The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking."

Count I charged that while traveling by air aboard defendant's aircraft from Acapulco, Mexico, to Chicago, Illinois, on flight number 170, said airline did maintain containers of oxygen aboard for therapeutic purposes, and that defendant's personnel aboard were trained to administer said oxygen to passengers. That decedent immediately after boarding said aircraft at 3:30 o'clock p.m., until 6:00 o'clock p.m., with full knowledge of said airline's personnel, exhibited pre-myocardial infaction symptoms or symptoms of oxygen need (labored breathing, weakness, gastro intestinal

complaints, nausea, vomiting, thirst, profuse sweating and coldness of extremities). That paragraph 8 of said complaint specifically charged said airline with allowing said pre-myocardial condition to develope into a fatal acute myocardial infarction by intentionally refusing to administer said oxygen to decedent after decedent had requested said oxygen on two occasions: the first time immediately upon boarding said aircraft at about 3:30 p.m., and the second, one-half hour before the fatal acute myocardial infarction resulted about 6:00 o'clock P.M. (Deposition of American Airline Stewardess Mary Craig, filed 1-30-76) [App'x.20]

Count II charged said airline with violation of said WARSAW Convention in a wilful and wanton manner (Section 25). In addition, said Count II, paragraph 7, charged that other

nationally known passenger-carrying airlines [Delta, Continental, Northwest Orient, Eastern, Transworld and United] did, unlike American Airlines, administer oxygen at the request of it's passengers or to those passengers exhibiting symptoms of labored breathing, gastro intestinal complaints, nausea and vomiting.

Count III of said Complaint charged defendant-respondent herein, Fireman's Fund American Life Insurance Company [hereinafter referred herein as the "insurance company] with a breach of it's contract to pay to plaintiff, individually, a $100,000.00 death benefit, as the beneficiary of flight-accident-policy, derived from plaintiff and her husband decedent being American Express Card members.

> [Editor's note: logically, if plaintiff could prove that decedent died "accidentally" at the hands of the airline under Counts I and II of the Complaint, there would be no issue to be resolved

> for plaintiff to collect the $100,000.00 death benefit provided for in the Contract with the insurance company.]

On February 3, 1976, the insurance company filed it's Motion for Summary Judgment. The Trial Judge, on said date, ruled that the motion would be resolved under Local Rule 13 of the Rules of the United States District Court - Northern District, which in substance allowed plaintiff herein ten (10) days in which to file an answering memorandum, and the movant to reply thereto within five (5) days. The rule also allowed either party, by motion, to request oral argument, before the motion was decided upon. [App'x. 27] Local Rule 9 of said Court [App'x. 29] is also relevant, because said rule limits each party to fifteen (15) pages to support it's position.

> [Editor's note: The Court, and all parties herein, totally disregarded said local rule in disposing of said

summary judgment motion, and rightfully so because of voluminous factual matters filed and considered by the Trial Court. Under the dictates of said rule the insurance company's motion should have been disposed of by February 18, 1976. The summary judgment was not ruled upon until June 14, 1976, without objection raised by any party, and particularly by the Trial Court, and for good reason because discovery in this case was being actively conducted by all parties; even a First Amended Complaint was filed as late as April 21, 1976. In other words the case was not even at issue when the insurance company filed it's motion for summary judgment. (It was impossible to rule on said motion for summary judgment within the time limits provided for by local rule 13)

The thrust of plaintiff's case was directed at the airline, not the insurance company - if plaintiff's cause failed against the airline, the case against the insurance company did also - the issue was "accidental" death under the provisions of the WARSAW Convention! To further illustrate the attitude of all parties involved herein there was no consideration given to said local rule No. 9: instead of fifteen (15) pages supporting plaintiff's position as stated in said rule, it was necessary that plaintiff's Answer and Brief consist of 51 pages, again without objection from anyone.]

Depositions of six witnesses were filed between the dates of July 22, 1975 and June 12, 1976. On the latter date the deposition of Dr. Lawrence G. Khedroo, M.D., was filed by the airline which was extremely germain to plaintiff's position in opposition to said insurance company's summary judgment motion and the airline's motion to strike and dismiss. Further, in fortification of plaintiff's position in opposing both defendants motions, was plaintiff filing a motion to admit on February 23, 1976, the in-flight rules and regulations promulgated by Delta, Continental, Northwest Orient, Eastern, Transworld and United for the administration of therapeudic oxygen to passengers, that departed substantially from those of the defendant airline. [App'x.20]

The motion for summary judgment filed by the insurance company was in two parts: Part I raised the defense that the plaintiff had forfeited her rights

under the insurance policy for failure to give the insurance company "notice of claim" within twenty (20) days after the occurrence, or within a reasonable time thereafter; Part II raised the defense that plaintiff would be unable to prove that defendant died of "accidental" causes under the terms of said policy. Part I, "forfeiture", is the issue raised in plaintiff's Petition herein. Part II, "accidental" death, was disposed of, in plaintiff's favor, when the Trial Court ruled against the airline's motion to strike and dismiss. Part I will be discussed below.

The substance of Part II of the insurance company's motion for summary judgment was the same as the airline's motion to strike and dismiss, to-wit: that "accidental" death was only contemplated where death resulted from the aircraft crashing into the ground. The Trial Court held

that all parties "introduced matters outside the pleadings" allowing both Part II of the insurance company's motion, and the airline's motion to strike and dismiss as a motion for summary judgment pursuant to Rule 12(b) of the Rules of Civil Procedure for the United States District Courts. [App'x.30]

On August 16, 1976, the Trial Judge filed a "Ruling on Motion", dated August 12 1976, [App'x. 13] denying the airline's motion (and in effect denying Part II of the insurance company's motion for summary judgment) holding that the Counts I and II of the First Amended Complaint should be tried to conclusion on the issue of whether or not the airline was guilty of causing the "accidental" death of decedent herein (Count I), or was guilty of wilful and wanton conduct toward the decedent in refusing him, on request, therapeudic oxygen, on two occasions before and during flight, all

under the provisions of the WARSAW Convention (Count II). Those Counts are still pending in the Trial Court awaiting the outcome of the Appellate procedure herein.

PART I OF THE INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT BASED UPON FORFEITURE

Part I of the insurance company's motion is substantially as follows: The insurance company showed that the decedent came to his death on April 20, 1974, while in flight aboard the aircraft. The company alleged that it had no "NOTICE OF CLAIM" until served with Summons as a co-defendant with the airline on December 9, 1974. It was alleged that plaintiff, individually, as a beneficiary of the master insurance policy issued to American Express card holders, violated the following quoted provisions of said master policy:

"NOTICE OF CLAIM: Written notice of claim must be given to Company within 20 days after the occurrence or commencement of any loss covered by the policy, or as soon thereafter as is reasonably possible. Notice given by or on behalf of the Insured Person or the beneficiary to Company at 3333 California Street, San Francisco, California, or to any authorized agent of Company, with information sufficient to identify the Insured Person, shall be deemed notice to Company."

"PROOFS OF LOSS: Written proof of loss must be furnished to Company at its said office in case of claim for loss within the 90 days after the date of such loss. Failure to furnish such proof within the time required shall not invalidate nor reduce any claim if it was not reasonably possible to give proof within such time, provided such proof is furnished as soon as reasonably possible and in no event, except in the absence of legal capacity, later than 1 year from the time proof is otherwise required."

[Editor's note: There was no issue raised that plaintiff failed to comply with the second paragraph, "PROOFS OF LOSS", in the insurance company's

motion for summary judgment but only a violation of the first paragraph, "NOTICE OF CLAIM". See the Trial Court's Opinion, App'x. A1 to A6 , and rightfully so, since a verified "Proof of Loss" was submitted as soon as practical following the "Notice of Claim" given to the insurance company. A case decided by the Illinois Supreme Court in 1976, supra, in direct opposition to the Federal Court decision herein, concerned itself with only the "Notice" provision. The "Proof of Loss" was perfunctory - merely submitting a certificate of death from the coroner's office.]

Part I of the insurance company's defense was "forfeiture" under said "Notice" provision. In opposition to Part I, plaintiff moved to strike that portion of the defense as legally insufficient, because the insurance policy involved failed to literally provide that there would be a "forfeiture" if the notice provision was not complied with. Plaintiff relied on two authorities under Illinois

Law to substantiate her position. WINDLE V. THE EMPIRE STATE SURETY CO., 151 Ill. App. 273 (1909), a case holding that if a forfeiture is to foreclose a policy holder's rights for giving a tardy "Notice of Claim" forfeiture should be specifically provided for under the terms of the policy. [WINDLE to date has not been overruled or distinguished.] In addition to WINDLE, plaintiff relied on ILLINOIS LAW and PRACTICE, Insurance, Section 434 (1956) declaring that WINDLE stated Illinois Law as late as 1956. It was assumed by plaintiff that the Federal Courts would follow Illinois Law on substantive matters, and "forfeiture" is substantive rather than procedural. [ERIE R. CO. V. TOMPKINS, 304 U.S. 64, 58 S. Ct. 817, 82 L. ed. 1188, ALR 1487 (1938); BARNETT V. NEW ENGLAND MUT. LIFE INS. CO. (CCA5th, 1941) 123 F2d 712] It was also assumed by plaintiff that the Federal Court would follow the Law of

Illinois that the proper procedure in Illinois to test the legal sufficiency of a motion for summary judgment is by way of a motion to strike and if overruled the moving party will be given the opportunity to set up a defense on the merits. KRZYZANOWSKI V. MAKOWSKI, 1 Ill. App. 2d 219, 117 N.E. 2d 328 (1953). KRZYZANOWSKI conforms to the Federal Rules of Civil Procedure, for the method to attack the legal sufficiency of any defense is done by a motion to strike. DEGENNARO V. PENNSYLVANIA R. CO., (D. C., Pa.), 68 F. Supp. 269 (1946); MILLER V. CAMARCO CONTRACTORS, INC., (D.C., N.Y.) 11 F. R. D. 560 (1951)

The Federal decisions, relating to summary judgment, hold that it is the duty of the Federal Courts, when ruling on matters arising out of the Summary Judgment provision of the Federal Rules of

Civil Procedure, to give all parties every opportunity to present facts to the trial court before ruling on a motion for summary judgment; that the only function of the trial court is to seek out factual matters to forestall summary judgments. In LOCKHART V. HOENSTINE, (C.A. 3rd) 411 F. 2d 455, 459 (1969) the Court stated that the trial court had a "duty to see that the parties have been given a reasonable opportunity to make their record complete"; BOOTH V. BARBER TRANSPORTATION CO., (C.A. Neb.) 256 F. 2d 927, 931 (1958) the Court stated that the trial court should not enter summary judgment if "it appears likely that evidence could be produced"; In BRENNAN V. REYNOLDS & CO., (N.D. Ill E.D.) 367 F.S. 440, 442 (1973) the Court stated that "it is incumbent that a court examine all proffered materials that are extraneous to the pleadings to determine whether there is a genuine

issue of material fact to be tried."; in BUSHMAN CONSTRUCTION COMPANY V. W. S. CONNER, (C.A.D.C.) 307 F. 2d 888, 893 (1962) it was stated that the trial court must give close "scrutiny" to any factual matters that might be presented before ruling on a summary judgment motion.

It will be clearly demonstrated that the Trial Court herein totally disregarded said fundamental law. It will be further demonstrated that the Trial Judge herein ruled against the plaintiff totally misapprehending the facts contained in the record. The Trial Courts nonfeasance was tacitly acknowledged by the Appellate Court, Seventh Circuit, because in It's Opinion, the Appellate Court failed to even acknowledge the theory espoused by the Trial Court and affirmed on a point never even considered, directly or remotely, by the Trial Court. The Appellate Court adopted a bizarre theory never

contemplated by the authors of said Rule 56, holding that the plaintiff herein had not "timely raised" or argued factual matters already contained in the record (Plaintiff's deposition). [App'x.A7] The Trial Court held that there were no facts [App'x. A1] contained in the record barring a summary judgment herein; The Appellate Court recognized the Trial Court's error and held that plaintiff had waived her right to argue the latter point. [App'x. A7]

The insurance company defended on the ground that plaintiff forfeited her rights to the $100,000.00 insurance proceeds for failure to give "Notice of Claim" within twenty (20) days following death. To substantiate it's position, the insurance company extracted a minute portion of plaintiff's deposition showing that she was aware that there was a flight accident policy in existence. Based

upon that single circumstance the defendant claimed that the plaintiff forfeited her rights under the policy for failure to give Notice of Claim within twenty (20) days of death. It was only on the latter circumstance that the Trial Court ruled a forfeiture, for the Trial Court's Judgment Order stated:

> "....A deposition of the Plaintiff shows that she was aware of the insurance policy of the Defendant shortly after her husband's death..." [App'x. A2]

Plaintiff moved to strike Part I of this defense as insufficient under law citing WINDLE V. THE EMPIRE STATE SURETY CO., 151 Ill. App. 273 (1909) and ILLINOIS LAW and PRACTICE, Section 434, Accident Insurance (1956) as stated above. Plaintiff assumed that the Federal Court would follow Illinois Law in diversity cases. VANDEN BARK V. OWEN-ILLINOIS GLASS CO., 311 U.S. 538, 61 S. Ct. 347, 85 L. ed 327 (1941); MIDDLE

ATLANTIC UTILITIES CO. V. S. M. W. DEVELOPMENT CORP., (C.A.S.D.N.Y.) 392 F. 2d 380 (1968). However, the Trial Court did not, stating "The Plaintiff's heavy reliance upon the case of WINDLE V. EMPIRE STATE SURETY COMPANY, 151 Ill. App. 273 (1909) is misplaced...." Even assuming that plaintiff's "reliance was misplaced", that factor does not preclude plaintiff from additionally bringing to the Trial Court's attention testimony in plaintiff's deposition, and other facts already in the Court's record, that would preclude a summary judgment in this case under Illinois Law, and plaintiff did, one month before the Trial Court entered summary judgment. However, the Trial Court misapprehended the facts as demonstrated in It's Judgment Order of June 14 1976; the Trial Court said:

> "....A deposition of the Plaintiff shows that she was aware of the insurance policy of the Defendant shortly after her husband's death,

> yet she never acted to notify the insurance company of her potential claim prior to the filing of this lawsuit. The plaintiff offers no explanation as to why she acted in this fashion...."
>
> [App'x.A4]

But there was an explanation for her failure, contained in plaintiff's deposition filed on July 22, 1975, one year previous to the Judgment Order, i.e., she was ignorant of the fact that she even had a potential claim under the air travel accident policy. It certainly is not unreasonable that she would be ignorant of such a potential claim where both the airline and the insurance company, in Part II of their motions, contended vigorously the inapplicability of such a policy to a death by heart failure, rather than said aircraft crashing into the side of a mountain.

After the plaintiff filed her Motion to Strike Part I of the insurance company's defense, the

defendant replied, perverting the facts already contained in the record, and in plaintiff's deposition filed July 22, 1975, by stating the following:

> "....The plaintiff offers no excuse for her failure to comply with the provisions nor does she contend that she supplied the information within a reasonable time but contends that she can still recover because the policy contained no provision stating that if she didn't comply her rights under the policy would be forfeited...."

Defendant's unfounded statement was filed with the Court May 5, 1976. Notwithstanding plaintiff's pending motion to strike Part I of said defense based upon the sufficiency of defendant's "forfeiture" defense under Illinois Law, plaintiff moved to file supplemental factual material to remove any doubt of the state of the record that defendant's conclusion mis-stated the substance of plaintiff's deposition. Such factual material was

sought to be filed on May 17, 1976, twenty-eight days before the Trial Court entered said summary judgment in favor of the insurance company, on June 14, 1976. But the trial court wrongfully denied plaintiff the right to file said factual material contrary to numerous holding cited above that required the Trial Court to give all parties every reasonable opportunity to present factual material to preclude a summary judgment. Compounding the error, the plaintiff moved the Trial Court to reconsider said factual material in plaintiff's Motion to Vacate said Summary Judgment filed on June 23, 1976, but said Motion to Vacate was denied.

The most conclusive factual material proferred to the Trial Court on May 17, 1976 and June 23, 1976, were excerpts from plaintiff's deposition filed a year before said summary judgment on July 22, 1975, (facts premeditatively omitted in defendant's motion)

showing that she was totally ignorant of a potential claim under the terms of the flight-accident policy. Ignorance of a policyholder's rights under the policy terms is a circumstance excusing the policyholder for being tardy by violating the strict policy provisions of giving "Notice of Claim" under Illinois Accident Insurance Law; Illinois Law provides that a jury question is presented to resolve the issue of whether or not said policyholder acted reasonably under all the facts and circumstances involved. A very recent case restating Illinois' position, cited to both the Trial and Appellate Courts, was decided by the Illinois Supreme Court in FARMERS AUTOMOBILE INSURANCE ASS'N V. HAMILTON, 64 Ill. 2d 138 356 N.E. 2d 1 (1976). [App'x. A31] In FARMERS the assured, as plaintiff herein, in violation of the "Notice of Claim" provision, tardily notified the insurance company over one

year after the occurrence when served with Complaint and Summons pertaining to the occurrence allegedly covered under the terms of his insurance policy (the "Notice" provision in this case, and that in FARMERS are substantially the same). The insurance company therein filed a declaratory judgment action seeking absolution from coverage because of the unreasonably late notice. The facts showed that the assured therein failed to comprehend that his policy might cover the incident involved therein. The trial court entered judgment against the assured holding that the assured failed to give notice of the occurrence "as soon as practical". The Appellate Court of Illinois reversed the trial court holding that a question of fact was presented as to whether or not the assured therein acted as a reasonable man in failing to comprehend his potential rights under the insurance policy in

question. The Supreme Court affirmed, holding similarly, that it was a jury question to determine whether or not the assured acted as a reasonably prudent person in not giving notice to the insurance company in strict compliance with the terms of the notice provisions of the policy. The Illinois Supreme Court said:

> "Plaintiff moved for summary judgment and in support of the motion filed the affidavits of the agent who had written the policy, the manager of the Mt. Vernon branch, its claims adjuster, and its assistant district claims manager, and the discovery deposition of its insured, Hamilton. It appears from the affidavits and the deposition that Hamilton did not give plaintiff notice of the occurrence until he was served with Summons shortly after February 8, 1971. It also appears that Hamilton did not know that the occurrence out of which defendant's claim arose was covered under the policy.
>
> The circuit court found that there was no genuine issue as to any material fact and allowed defendant's motion for summary judgment. The

appellate court, noting that Hamilton had stated in his discovery deposition that he did not know that the homeowner's insurance policy covered the occurrence, held that where the insured, acting as a reasonably prudent person, believed that the occurrence was not covered by the policy, delay in giving notice may be excused and that the record showed that there existed a question of fact whether the delay in giving notice was excusable...." [App'x. A1]

"In ECONO LEASE, INC. V. NOFFSINGER, 63 Ill. 2d 390, 393, we said: "A motion for summary judgment will be granted if the pleadings, depositions, admissions and affidavits on file reveal that there is no genuine issue as to any material fact and that the movant is entitled to a judgment or decree as a matter of law. (Ill. Rev. Stat. 1975, ch. 110, par. 57(3); CARRUTHERS V. B. C. CHRISTOPHER & CO., 57 Ill. 2d 376.) A reviewing court must reverse an order granting summary judgment if it is determined that a material question of fact does exist." In BARRINGTON CONSOLIDATED HIGH SCHOOL V. AMERICAN INSURANCE CO., 58 Ill. 2d 278, which involved a notice provision similar to that contained in plaintiff's policy, we said:

"Provisions in policies stating when the insurer must be nofified of a covered occurrence have generally been interpreted to require notification of the company within a reasonable time, considering all the facts and circumstances of the particular case. Decisions illustrating this general holding include WALSH V. STATE FARM MUTUAL AUTOMOBILE INSURANCE CO, 91 Ill. App. 2d 156; HOFFMAN & KLEMPERER CO. V. OCEAN ACCIDENT & GUARANTY CORP., (7th Cir. 1961), 292 F.2d 324; see also 18 A.L.R. 2d 443, 448 (1951).

Couch's comment on the term used in the policy here for the time of reporting, 'As soon as is practical' is: '"As soon as practicable" in a policy covering liability for personal injury and property damage means within a reasonable time, and what is a reasonable time depends upon the facts and circumstances of the case.' 13 Couch of Insurance 2d sec. 49:328 (1965); see also 2 Long, The Law of Liability Insurance sec. 13.09 (1974)."
58 Ill. 2d 278, 281-82.

It was Hamilton's duty to give timely notice to plaintiff of any occurrence of injury which would suggest to a reasonably prudent person that a claim for damages might be asserted for which coverage might be provided under his homeowner's policy. (CENTURY INDEMNITY CO. V. SERAFINE (7th Cir. 1963); 311 F. 2d 676.) Whether Hamilton, acting under the belief that the occurrence was not covered by the policy, acted as a reasonably prudent person in not giving notice until he was served with summons was a question of fact. CITY OF CHICAGO V. UNITED STATES FIRE INSURANCE CO., 124 Ill. App. 2d 340 (See also Annot., 18 A.L.R. 2d 443, 478 (1951).)...."

"We hold that this record failed to show that there was no genuine issue of any material fact and that the circuit court erred in granting plaintiff's motion for summary judgment. The judgment of the appellate court is affirmed."
[App'x. A31]

The deposition of plaintiff, on file for over one year, when the Trial Court herein decreed that there were no facts in the records, showed exactly the same circumstances as presented in FARMERS,

i.e., plaintiff had no comprehension that an accident policy covering a trip from Mexico to Chicago, Illinois, might potentially cover a fatal heart attack aboard said aircraft. The following quoted questions and answers were called to the Trial Court's attention, demonstrating plaintiff's ignorance, one month before the Trial Court held, "that plaintiff offers no explanation as to why she acted in this fashion" (in not giving notice). [App'x. A4]

The questions and answers were made during interrogation by the insurance company's attorney:

"...Q Okay, at anytime before your husband's death, were you aware your husband had used the American Express card to pay for his ticket?

A Do you mean on the American Express card?

Q Yes.

A Oh, yes. I mean we planned it that way.

Q You knew you would have this extra flight insurance?

A Yes.

Q Or the flight insurance.

A Yes. Before we had the American Express card, we would would buy flight insurance at the airport.

Q I'm talking about on this flight. Did you know before your husband's death that you were covered by the American Express insurance program for this flight?

A I was aware we always had insurance, flight insurance. What are you trying to say?

Q Did you know you had an insurance policy in effect?

A Oh, sure, of course. I always knew that because before we had this, we would buy insurance at the airport.

Q Then after your husband died, you knew you had some type of claim under an insurance policy for his death?

A I was not aware of that until -- at that time, no. I mean I knew I had insurance but I didn't know-- I was not aware if it would cover this kind of a claim absolutely not.

Q You knew you had the policy but you didn't know if it would cover this type of claim?

A No. I wasn't aware of that. That was the last thought in my mind....." (Plaintiff's Deposition pp 67-68)

While under examination by plaintiff's attorney the following was elicited:

....."EXAMINATION
By Mr. Stanley:

Q Mrs. Harris, you made certain answers to discussing claims under an insurance policy under the American Express card and you indicated that you had turned those matters over to our firm at our first conference. Do you recall whether or not you held--

A Where was that?

Q Do you recall whether or not you had held off-

A Did Daniel Hughes write the first one?

Q I believe there is an AllState policy which is outstanding and Mr. Hughes as I recall was given that at some time unbeknown to any of us here. I want to clear up, did you or did you not make a claim yourself under the American Express policy before it was ever given to us?

A I did not. Maybe Mr. Hughes did. I think he did. He could have written to them.

Q And I think if I recall from our conversation you were not even aware you may even have a claim under that, as I recall.

A No. I wasn't aware of that.

Q And I think the term that was employed by our office was whether or not this was an accident policy or not an accident and was this an accident at all under concepts of law. Do you recall any of those conversation?

A Yes. Now I do; yes."
.... (Plaintiff's Deposition pp 72-73)

"...Q Did you have any knowledge of what your rights were under the policy when you turned them over to Mr. Hughes?

A When I turned it over to Mr. Hughes, I read the policy. That policy I read and the All State policy and I didn't know if I had any rights or not so I wrote them and asked them and then --

Q Who did you write to, All State?

Q All State's up here so then I asked Danny Hughes to write it for the American Express so he must have had that policy right after we opened the safety deposit box. I saw the policy but as far as reading is concerned, I don't recall. I didn't see - I don't know what my rights were."
..... (Plaintiff's Deposition p 75)

In addition plaintiff filed her affidavit to further clarify her ignorance to her potential claim. The affidavit was also attempted to be filed with the Trial Court twenty-eight (28) days before the Trial

Court entered summary judgment, and said affidavit was in the following words and figures:

> "ELEANOR E. HARRIS, Plaintiff, being first duly sworn deposes and states that until the time of her conversation with her attorney, Charles R. Balkin she had no understanding that she might have a claim under the provisions of the American Express Insurance Policy because there was no airplane crash leading to the death of her husband."

Evidence is admissible concerning a person's knowledge as to contents of a contract. PINNEY V. CLEVELAND, C., C. & ST. L. R. CO., 146 Ill. App. 150 (Shipper's Contract); evidence is also admissible as to a party's understanding of his contract. CARRIER V. HOOPER, 247 Ill. 502, 93 N. E. 374 (1910), (real estate contract); CALLAGHAN'S ILLINOIS EVIDENCE, Admissibility of Evidence Generally, Knowledge or Understanding, Sec. 5.714,

p.126, Federal Rules of Evidence, Rule 803 (1) ("a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter")

In addition an affidavit of plaintiff's attorney was also attempted to be filed at said time showing that plaintiff was not apprised of her potential rights until November 11 1975, and upon being so apprised, authorized said attorney to immediately notify the insurance company of plaintiff's potential claim.

Said attorney's affidavit was in the following words and figures:

> "CHARLES R. BALKIN, one of plaintiff's attorneys, being first duly sworn, deposes and states that on November 11, 1974 he did explain to the plaintiff, Eleanor E. Harris, that in light of the fact that her husband died of the alleged negligence of the American Airlines personnel in not giving oxygen to her husband when requested, said occurrence might be considered an "accident" giving rise to a claim, against the defendant

insurance company; Upon learning of the potential claim the plaintiff did authorize Affiant to give "Notice of Claim" to the defendant insurance company, which Affiant did by telephone on November 11, 1974; Affiant did talk to defendant's representative, Mr. Steve Bishof, and during said conversation Mr. Bishof did take pertinent data over the telephone and informed Affiant that he would check on the decedent's American Express No. and that if he did find that he did hold an American Express Card and that the circumstances of the death came within the coverage that Fireman's Fund would honor the claim; Approximately two to three weeks later Affiant informed Mr. Bishof of decedent's American Express Card No. and Mr. Bishof informed Affiant that they were unable to locate decedent's policy: In the latter conversation Affiant informed Mr. Bishof that Affiant was filing a lawsuit against American Airlines and also defendant Insurance company and that Affiant would sign a Stipulation extending defendant's time to answer the Complaint to be filed for 120 days; In neither of the conversations did Mr. Bishof make any reference, or complaint, that the defendant did not receive "Notice of Claim" or "Proof of Loss"; On December

18, 1974 Affiant conferred further with said Mr. Bishof by telephone and requested "Proof of Loss" forms and he also informed Mr. Bishof that he was mailing to him said 120 day Stipulation. A copy of the letter sent to Mr. Bishof is attached hereto and made a part hereof and marked Exhibit 1; Mr. Bishof's letter to Affiant is attached as Exhibit 2 (said letter shows there was no mention of a "late" "Notice of Claim" and he did forward "Proofs of Loss"). In the later letter Mr. Bishof did forward to Affiant specimen copies of defendant's insurance company, marked Exhibit 3, which is not the "Master Policy" which is made part of defendant's Motion for Summary Judgment; "Proofs of Loss", marked Exhibit 4, were forwarded by letter to Mr. Bishof on March 21, 1975, by Letter marked Exhibit 5, wherein Affiant explained that the reason for the delay in getting "Proofs of Loss" to defendant was because of the absence of Dr. Novosil, the Coroner's physician."

Notwithstanding the abundanee of factual material proffered to the Trial Court, the Trial

Court held that no factual material was presented that raised a factual question as to the reasonableness of plaintiff's misapprehension of her rights, leading to plaintiff's tardy notice and the application of the FARMERS case holding that a jury should resolve the factual issue raised.

It is obvious that the Appellate Court herein recognized the error of the Trial Court by failing to even allude to the rational employed by the Trial Courts in granting defendant a summary judgment. The Appellate Court seized on to Rule No. 13 to affirm, saying that, "In view of plaintiff's failure to raise this argument in a document filed pursuant to the briefing schedule by the district court, the judge did not abuse his discretion in refusing to consider the argument in ruling on defendant's motion." [App'x.A10] The Appellate Court's error can readily be demonstrated that

Local Rule 13 was waived many times over by all involved (the Trial Court included), because of the complicated and involved factual material presented to the Trial Court. Plaintiff's main concern was Part II of the insurance company's motion for Summary Judgment and the airlines motion to strike and dismiss: was this an "accident" under the provisions of the WARSAW Convention? Just a cursory examination of the work involved following the insurance company's premature motion for summary judgment on February 3, 1976, shows that said Rule 13 was furthest from anyone's mind while said motions were pending. The District Court Clerk's "List of Documents" bears this out:

"2-3-76	Filed defendant's Motion for Summary Judgment with exhibits
2-23-76	Filed plaintiff's Notice of filing Motion to Admit (Oxygen regulations of Delta, Continental, Northwest Orient, Eastern,

	Transworld and United Airlines)
4-21-76	Filed First Amended Complaint
4-22-76	Filed Plaintiffs Memorandum of Authorities In Answer to defendant Firemans Fund Motion for Summary Judgment
4-22-76	Filed Plaintiff's Answer to defendant Fireman's Fund American Life Insurance Co.
5-11-76	Filed defendant Fireman's Fund Answer to First Amended Complaint
5-12-76	Filed deposition of Dr. Lawrence G. Khedroo (1 vol)
5-17-76	Filed Plaintiff Answer to defendant's Fireman's Fund American Life Insurance Company, Reply Memorandum
5-17-76	Filed Memo of Authorities in Support of Plaintiff's Answer to Defendant's Fireman's Fund American Life Insurance Company Reply Memorandum
5-17-76	Enter Order dated 5-17-76: Plaintiff's Motion to file factual matters and memorandum of Authorities in Answer

	to defendant Fireman's Funds Reply Memorandum of Authorities is denied.
6-14-76	Enter Order dated 6-10-76; Pursuant to the Court's Judgment Order, defendant Fireman's Fund Life Insurance Company's Motion for Summary Judgment is hereby granted." [App'x. 20]

The matter was not even at issue on February 3, 1976, when the insurance company filed it's Motion for Summary Judgment. The First Amended Complaint was filed over two months later, April 21, 1976. The insurance company filed it's Answer on May 11, 1976. The Trial Court never considered said Local Rule 13 as having any applicability. The Trial Court never even hinted that Local Rule 13 was considered. [App'x. A1]

Following the Trial Court Summary Judgment Plaintiff even filed a Motion to Vacate said Judgment, attempting again to file said factual material

that would preclude a summary judgment under said FARMERs decision. This was done on June 23, 1976, but to no avail.

The Appellate Court wrote It's opinion with total disregard to the rationale of the Trial Court. The Appellate Court decision even missed the issue resolved at the trial level. The Appellate Court based it's decision on the fact the "written proof of loss" was not furnished to the insurance company within ninety (90) days of the occurrence, when the only issue resolved by the Trial Court was that "Notice of Claim" was not timely furnished. Written "proof of loss" could be furnished within one (1) year of the death, and it was so furnished, well within the contract-time requirement.

Plaintiff filed a Petition for Rehearing within fourteen (14) days following the Appellate Court decision rendered August 30, 1977, pursuant

to Rule 40, Rules of the United States Court of Appeals. Plaintiff's Petition for Rehearing attempted to demonstrate the Appellate Court's misapprehension of the facts, even to the point of showing the Appellate Court that the one case cited as authority in It's opinion, STEVEN V. ROSOE TURNER AERNAUTICAL CORP., 324 F. 2d 157 (7th Cir.1963) [App'x.All] had absolutely no relation to the facts in this Appeal. The STEVEN case involved the trial court denying plaintiff time to obtain "additional evidence" sixteen weeks after the defendant filed it's motion for summary judgment, without any showing to the trial court the plaintiff had any idea where such additional evidence would come from. The STEVEN Court held there was no abuse of discretion exercised by the trial court in denying plaintiff further time to conduct a "fishing expedition". [App'x.All] There was no "fishing expedition"

involved herein, the facts were already of record a year before this Trial Court ruled.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

There are two reasons that the Writ of Certiorari should be granted:

1. Said decision is in direct conflict with the decision of WASHINGTON-SOUTHERN NAVIGATION COMPANY V. BALTIMORE & PHILADELPHIA STEAMBOAT CO., 263 U.S. 629, 58 L. ed 480, 44 S. Ct. 220 (1924). In the latter case one of the parties failed to file a bond contrary to an Admiralty Rule, and the issue certified to the Supreme Court was whether or not the District Court had the power to stay the Admiralty proceedings because said Local Rule was violated. The Supreme Court held that said Local

Rule of Procedure shall not be employed to defeat a litigant's substantive rights. Mr. Justice Brandess delivered the opinion of the Court stating:

> "....The right of a citizen of the United States to sue in a court having jurisdiction of the parties and of the cause of action includes the right to prosecute his claim to judgment. ILLINOIS CENTRAL R. R. CO. V. ADAMS, 180 U.S. 28, 34; MC CLELLAN V. CARLGAN, 217 U.S. 268, 281. Obviously, it was not the intention of this Court, in adopting the rule, to disregard the right of seamen, of poor persons or of others to prosecute suits in admiralty. The function of rules is to regulate the practice of the court and to facilitate the transaction of its business. This function embraces, among other things, the regulation of the forms, operation and effect of process; and the prescribing of forms, modes and times for proceedings. Most rules are merely a formulation of the previous practice of the courts. Occasionally, a rule is employed to express, in convenient form, as applicable to certain classes of cases, a principle of substantive law which has been established by

> statute or decisions. But no rule of court can enlarge or restrict jurisdiction. Nor can a rule abrogate or modify the substantive law. This is true, whether the court to which the rules apply be one of law, of equity or of admiralty. It is true of rules of practice prescribed by this Court for inferior tribunals, as it is of those rules which lower courts make for their own guidance under authority conferred...."
> (263 U.S. 635-636)
> [App'x. A37)

2. Said decision is also in direct conflict with SEASON-ALL INDUSTRIES, INC., V. TURKIYE SISE VE CAM FABIK, A.S. (C.A. Pa.) 425 F.2d 34 (1970) wherein the Pennsylvania Court held that no local rule of procedure should be employed to defeat substantive right granted to a litigant under the Summary Judgment section of the Rules of Civil Procedure for the United States District Courts (Rule 56). The Pennsylvania District Court held that a litigant should be given every opportunity to raise all factual matters before ruling on

a motion for summary judgment saying:

> "[10, 11] Moreover, we believe that it is undesirable in general for a district court to enter summary judgment after receiving briefs and without holding a hearing unless it makes clear in its order that all affidavits and counter-affidavits must be filed with the briefs. It is true that the last paragraph of Rule 78 authorizes a court to expedite its business by a "provision by rule or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition." We need not decide whether this provision is applicable to a motion for summary judgment, which if granted disposes with finality of a claim or a defense. At the least, as a matter of good practice, we believe resort should not be had to this provision on a motion for summary judgment unless it is made clear beyond all doubt that the parties must present their affidavits and counter-affidavits in addition to whatever facts appear in the pleadings, depositions, answers to interrogatories and admissions on file. Only then will it be proper to determine whether a genuine issue of fact exists which requires a trial. In the usual case it is more appropriate

to set a motion for summary judgment down for hearing as Rule 56(c) provides and to make the date of hearing the time limit for both sides in the presentation of their factual claims. Indeed, it is only in this way that a full opportunity can be afforded for compliance with the provision of Rule 56(c) authorizing the adverse party to serve opposing affidavits "prior to the date of the hearing."....

"The order of the district court, therefore, will be vacated and the case remanded for further proceedings."
(425 F.2d 39, 40)
[App'x . A49]

CONCLUSION

Two Federal Courts have been involved in defeating fundamental rights granted to the plaintiff. The Appellate Court recognized the Trial Court's error by not even acknowledging the rationale employed by the District Court. It could not, because said decision had neither foundation in law nor fact. The Appellate Court then compounds

the error by utilizing Local Rule 13, a rule that was not even considered at the trial level and employed to defeat plaintiff's substantive rights, contrary to dictates of Supreme Court of the United States, and numerous other decisions of Appellate Courts throughout the Country. It is prayed that the two wrongs will be rectified and this Writ of Certiorari be granted so that all issues arising out of decedent's death can properly be litigated in the District Court, along with plaintiff's case still pending against American Airlines.

Respectfully submitted,

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James Harris, Dec., and
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APPENDIX

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ELEANOR E. HARRIS, Adm. of the Estate of LEONARD JAMES HARRIS, Dec., and ELEANOR E. HARRIS, IND.	)	
Plaintiff,	)	
vs.	)	No. 74 C 3443
AMERICAN AIRLINES, INC., a New York Corp., and FIREMAN'S FUND AMERICAN LIFE INSURANCE COMPANY, a California Corp.,	)	
Defendants.	)	

JUDGMENT ORDER

One of the Defendants in this action, the Fireman's Fund American Life Insurance Company, has filed a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. For the following reasons, that motion is granted.

This litigation arose as a result of the death

of the husband of the Plaintiff from a heart attack suffered while the deceased was a passenger on an airliner operated by another Defendant in this case, American Airlines. In essence, the amended complaint alleges that agents of American failed to act in a proper manner when the deceased began to exhibit symptoms of myocardial infarction. Count III of that complaint pertains to the insurance company, which insured certain holders of American Express credit cards, such as the deceased, in the event of "accidental" death or injury while passengers on commercial aircraft. Two primary issues are raised by the insurance company in its motion, but only one of them need be dealt with in order to dispose of this motion.

The defendant insurance company claims that the Plaintiff failed to comply with two material provisions of the insurance policy issued to the deceased. These provisions of the master policy, issued by Fireman's Fund to American Express, required that: 1) written

notice of a claim be given to the insurance company within 20 days after the occurrence of the loss, and that 2) proofs of loss be furnished to the insurance company within 90 days after the occurrence of the loss. The Plaintiff's decedent died on April 20, 1974, but an affidavit submitted by the Defendant indicates that no formal notice of claim or proof of loss was ever submitted to the insurance company prior to the instigation of this lawsuit, in December of 1974. The issue for this court to determine is whether or not the non-compliance of the express provisions of the policy bar recovery. A deposition of the Plaintiff indicates that she was aware of the existence of this insurance policy shortly after the death of her husband.

The express terms of the master policy, issued by Fireman's Fund to the American Express Company, govern the rights of the Plaintiff in this situation. HOFELD V. NATIONWIDE LIFE INSURANCE CO.,

59 Ill. 2d 522 (1975). The specific terms of the contract relevant to this motion read as follows:

> Notice of Claim: Written notice of claim must be given to company within 20 days after the occurrence. . . of any loss covered by this policy, or as soon thereafter as is reasonably possible...
>
> Proofs of Loss: Written proof of loss must be furnished to company. . . in case of claim for loss within 90 days after the date of such loss. Failure to furnish such proof within the time required shall not invalidate or reduce any claim if it was not reasonably possible to give proof within such time. . .

The Plaintiff did not comply with those provisions following the death of her husband.

An insurance policy is, in essence, a contract, and the courts will interpret it as such. See, e.g., Walsh v. State Farm Mutual Auto Insurance Company, 91 Ill. App. 2d 156 (1968). The notice provisions in the insurance contract at issue here are typical of clauses in most accident policies, and Illinois courts recognize the fact that such terms are reasonable under most circumstances. Barrington Consolidated High

School Dist. v. American Insurance Company, 58 Ill. 2d 278 (1974). The notice requirement in an insurance policy is a requirement of substance, and its terms must be complied with as a prerequisite to coverage. International Harvester Company v. Continental Casualty Company, 33 Ill. App. 2d 467 (1962). A failure on the part of an insured to comply with this type of notice or proof provision relieves an insurance company of liability; a breach of these terms is viewed as a breach of a prime condition of the contract. Star Transfer Company v. Underwriters at Lloyds of London, 323 Ill. App. 90 (1944); Cf. Tarzian v. West Bend Mutual Fire Insurance Company, 74 Ill. App. 2d 314 (1966).

Courts in Ilinois have exhibited a tendency to interpret these requirements very strictly; an insured must act in accordance with the notice and proof provisions of the insurance policy if the insurance company is to be held liable. See e.g., Mutual

Benefit Health & Accident Association, 276 F.2d 53 (5th Cir. 1960) (interpreting Illinois law); Winkfield v. American Continental Insurance Company, 110 Ill. App. 2d 156 (1969); Martin v. Illinois Commercial Men's Association, 195 Ill. App. 421 (1915). Following the guidance of these decisions, I must conclude that the Plaintiff failed to act in accordance with the notice and proof provisions in the defendant's policy. The time limits specifically set forth were obviously not complied with, and those phrases allowing notice or proof "as soon as possible" were likewise not met. A deposition of the Plaintiff shows that she was aware of the insurance policy of the defendant shortly after her husband's death, yet she never acted to notify the insurance company of her potential claim prior to the filing of this lawsuit. The plaintiff offers no explanation as to why she acted in this fashion. It is difficult for me to imagine any legitimate excuse for her conduct; it seems that

she could have notified the insurance company within days of the incident which resulted in her husband's death, yet she evidently chose not to do so. This conduct amounts to a failure to comply with the express provisions of the policy. Compliance with these terms is a prerequisite to the liability of the insurance company. By breaching these "prime conditions" of the contract, the Plaintiff has made recovery from the Defendant impossible under these circumstances. The failure of the insured to comply with these provisions justifies a disclaimer of liability by the insurance company. Allstate Insurance Company v. Hoffman, 21 Ill. App. 2d 314 (1959).

The Plaintiff argues that the Defendant waived compliance with the notice and proof of loss clauses in the policy when it denied liability on other grounds after this lawsuit was filed. However, this argument lacks merit. The Plaintiff mistakenly relies upon the case of Tarzian v. West Bend Mutual Fire Insurance

Company, 74 Ill. App. 2d 314 (1966), to justify her position. That case did hold that waiver was possible, but only in limited situations where the insurance company denied liability during the period of time when the insured was to file the notice or proof of loss statements with the insurance carrier. In the case presently before me, the insurance company denied liability only after the time period in which the insured was to submit a notice of a claim or proof of loss. This distinction is significant; in fact, case law indicates that no waiver occurs if the insurance company acts to deny all liability after the time period for filing a notice of a claim or a proof of loss. Oakley Gram & Supply Company v. Indemnity Insurance Company, 173 F.Supp. 419 (S.D. Ill. 1959); Buysse v. Connecticut Fire Insurance Company, 240 Ill. App. 324 (1926).

Finally, the Plaintiff claims that the lack of a forfeiture clause in this insurance policy means

that her non-compliance with the notice and proof provisions cannot be used so as to void her rights under the policy. This does not appear to be the law in Illinois at the present time; recent cases do not even mention the requirement of a forfeiture clause under these circumstances. See e.g., Walsh v. State Farm Mutual Auto Insurance Company, 91 Ill. App. 2d 156 (1968); International Harvester Company v. Continental Casualty Company, 33 Ill. App. 2d 467 (1962); Star Transfer Company v. Underwriters at Lloyds of London, 323 Ill. App. 90 (1944). The Plaintiff's heavy reliance upon the case of Windle v. Empire State Surety Company, 151 Ill. App. 273 (1909) is misplaced. That case is contrary to the modern trend, which does not require any forfeiture clause. It appears that the Windle case has been ignored for the past fifty years and overruled by implication within that period of time. Consequently, it is of little significance that the insurance policy

drawn by the Defendant contains no forfeiture clause.

Since this motion can be disposed of on the basis of the lack of compliance with these contract provisions, I do not reach any other issues raised by the Defendant in its motion. The motion of the Defendant Fireman's Fund American Life Insurance Company for summary judgment is granted.

It is so ordered.

/s/ Richard B. Austin
Judge, United States District Court

DATED: June 10, 1976

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 35

AUGUST 30, 1977
(ARGUED APRIL 8, 1977)

BEFORE

HON. Luther M. Swygert, Circuit Judge

HON. William J. Bauer, Circuit Judge

HON. Harlington Wood, Jr. Circuit Judge

Eleanor E. Harris, Adms. of the Estate of Leonard James Harris, Deceased, and Eleanor E. Harris, Individually, Plaintiff-Appellant,	)Appeal from the)United States)District Court)for the Northern)District of Ill.
No. 76-1957 vs.	)Eastern Division.)No. 74 C 3443
American Airlines, Inc., a New York Corp., Defendant, and Fireman's Fund American Life Insurance Company, a California Corp., Defendant-Appellee.	)Richard B. Austin,)Judge

ORDER

Plaintiff appeals pursuant to Rule 54(b) from a summary judgment granted defendant Fireman's Fund American Life Insurance Company. Plaintiff seeks payment on an accidental death policy issued by Fireman's Fund. We affirm.

Plaintiff and her husband purchased tickets for a flight from Acapulco, Mexico to Chicago on their American Express credit card. By charging the flight, they obtained coverage for the flight under a flight insurance policy issued to American Express by Fireman's Fund for the benefit of persons who charge airline tickets on their American Express credit cards. The policy provides cardholders protection from losses

> "resulting directly and independently of all other causes, from accidental bodily injury . . . received during a one way or round airline trip taken by the assured. . . . "

Pursuant to Illinois statutory requirements, the policy contains a notice of claim provisions requiring written

notice of a claim to be given to the company "within 20 days after the occurrence or commencement of any loss covered by the policy, or as soon thereafter as is reasonably possible" and a proof of loss provision providing:

> "Written proof of loss must be furnished to Company at its said office in case of claim for loss within the 90 days after the date of such loss. Failure to furnish such proof within the time required shall not invalidate nor reduce any claim if it was not reasonably possible to give proof within such time, provided such proof is furnished as soon as reasonably possible and in no event, except in the absence of legal capacity, later than 1 year from the time proof is otherwise required."

On April 20, 1974, Leonard Harris suffered a heart attack while on board the Acapulco-Chicago flight. He felt ill when he boarded the plane and his condition progressively worsened during the flight. At one point during the flight, Mrs. Harris asked a stewardess to bring oxygen for Mr. Harris. The stewardess refused, citing an airline policy against giving oxygen to persons who are not unconscious, irrational, suffering

from severe chest pain or who do not possess a doctor's note requesting the administration of oxygen. As Mr. Harris' condition worsened, two doctors who were passengers on the flight were called to aid him. They administered oxygen about twenty minutes after the original request was made. The oxygen failed to improve Mr. Harris's condition, and he died on the plane.

Mrs. Harris gave no notice to Fireman's Fund of her claim against its policy until the filing of this lawsuit on November 27, 1974, over seven months after Mr. Harris' death.*

The district court granted Fireman's Fund summary judgment on the ground that Mrs. Harris had failed to comply with the time limit for notifying the insurance company of her claim.

---

* Plaintiff also sued American Airlines for Negligent and wilful and wanton violations of the Warsaw Convention in failing to administer oxygen to her husband before his death. These claims are still active in the district court.

Mrs. Harris argues to us that the district court erred in granting Fireman's Fund summary judgment because a genuine issue of fact exists as to whether Mrs. Harris's notice to the company of her claim met the policy's requirements that claims be filed as soon after the occurrence of loss "as is reasonably possible." She claims that she met this requirement because she was unaware until the date the lawsuit was filed that the policy might cover her husband's death. The district court held that no such issue of fact existed because plaintiff's deposition indicates that she was aware of the insurance policy shortly following her husband's death, and that she offered no explanation for not notifying the company at that time.

Mrs. Harris contends on appeal that she offered the above explanation for her late notification in a document that the district court denied plaintiff the right to file, entitled "Plaintiff's Answer to Defendant's, Fireman's Fund American Life Insurance Company, Reply

Memorandum." The document was written in response to defendant's reply to plaintiff's answer to defendant's motion for summary judgment.

We hold that the district court did not abuse its discretion in refusing to consider the aforementioned document and thus did not err in granting defendant summary judgment.

On February 9, 1976, the district court ruled that defendant's summary judgment motion would be taken under Local Rule 13 for Briefing. Local Rule 13 requires an answering memorandum from the party opposing the motion within ten days, and a reply from the moving party within five days thereafter. On March 11, plaintiff obtained an extension to April 10 to file her answering memorandum. On April 22 plaintiff obtained leave of court and filed her answering memorandum. On May 5, the defendant filed its reply memorandum. At that time, neither party having requested oral argument, the briefing schedule was complete, and the matter was

ready for decision. Almost two weeks later, on May 17, plaintiff filed the answer to plaintiff's reply brief she asks us to consider here. Judge Austin denied plaintiff leave to file the answer.

Defendant's motion for summary judgment raised the issue of plaintiff's failure to timely notify defendant of her claim. Plaintiff answered by arguing that the policy contained no forfeiture clause calling for the denial of benefits if claims were not timely filed. Her answer did not mention the alternative argument she presses here, vis., that she was unaware that the policy covered her husband's death until the lawsuit was filed. This argument was first raised in plaintiff's memorandum that was rejected by the district court.

In view of the plaintiff's failure to raise this argument in a document filed pursuant to the briefing schedule set by the district court, the judge did not abuse his discretion in refusing to consider the argument in ruling on defendant's motion. See Steven v. Roscoe

Turner Aeronautical Corp., 324 F.2d 157 (7th Cir. 1963). Accordingly, because the argument was not timely raised to the district court, we will not consider it on appeal.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

SEPTEMBER 29 , 1977

HON. Luther M. Swygert, Circuit Judge

HON. William J. Bauer, Circuit Judge

HON. Harlington Wood, Jr., Circuit Judge

Eleanor E. Harris, Administrator of the Estate of Leonard James Harris, Dec., and Eleanor E. Harris, Individually, Plaintiff-Appellant	
No. 76-1957 vs.	On Petition for Rehearing
American Airlines, Inc., a New York Corporation, Defendant, and Fireman's Fund American Life Insurance Company, a California Corporation, Defendant-Appellee.	

ORDER

On consideration of the petition for rehearing in the above-entitled cause by Plaintiff-Appellant

Eleanor E. Harris, all of the judges on the original panel having voted to deny the same.

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ELEANOR E. HARRIS, Administrator of the Estate of LEONARD JAMES HARRIS, Deceased, and ELEANOR E. HARRIS, Ind., Plaintiff,	)	
vs.	)	No. 74 C 3443
AMERICAN AIRLINES, INC., et al., Defendants.	)	

RULING ON MOTION

Plaintiff has brought this suit against Defendant alleging Defendant's wilful and wanton misconduct in refusing to offer her husband (hereinafter Leonard) aid that allegedly would have prevented his death from myocardial infarction. More specifically, Plaintiff alleges that while she and Leonard were passengers aboard one of Defendant's flights from Acapulco, Mexico, Leonard began experiencing nausea and shortness of breath, and that when Plaintiff requested that

he be given oxygen she was informed that no oxygen could be administered until a passenger passes out. Defendant has filed a motion to strike and dismiss Plaintiff's first amended complaint.

Defendant first argues that, under the facts of this case, it had no duty to administer oxygen to Leonard upon request or to diagnose pre-myocardial infarction syndrome in its passengers or to prescribe and administer oxygen for such illness. Although the Defendant concedes that it has a duty to take reasonable action to aid passengers after it knows that they are ill, it argues that it had no knowledge or notice of Leonard's heart attack, and that even if it had such knowledge or notice the immediate administration of oxygen to Leonard would not have prevented his death. The Defendant has asserted this lack of duty in support of a motion to dismiss for failure to state a proper claim for relief. However, on this motion Defendant has introduced matters outside the pleadings. Consequently, pursuant to Rule 12(b)

of the Federal Rules of Civil Procedure, Defendant's motion must be treated as a motion for summary judgment.

It is well established that the party moving for summary judgment must carry the burden of showing the absence of any genuine issue of fact. Adickes v. Kress & Co., 398 U. S. 144, 157 (1970). In addition, "the inferences to be drawn from the underlying facts contained in [the moving party's] materials must be viewed in the light most favorable to the party opposing the motion." United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). Of course, under Rule 56(e) of the Federal Rules of Civil Procedure, the party opposing a properly supported motion must respond and his response "must set forth specific facts showing that there is a genuine issue for trial." However, "[w]here the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented." Adickes v. Kress & Co., 398

U.S. 144, 160 (1970), quoting Advisory Committee Note on 1963 Amendment to subdivision (e) of Rule 56.

After a review of the briefs supporting and opposing the motion for summary judgment, I cannot say that Defendant has carried its burden of showing the absence of any genuine issue of fact. With regard to the question of notice, Defendant's brief certainly does not preclude the possibility that nausea and shortness of breath is adequate notice that a passenger may be experiencing a heart seizure. Moreover, with regard to the efficacy of administering oxygen to such a passenger, only Dr. Oliveri has expressly stated that oxygen would not have aided Leonard. Certainly his testimony is subject to contradiction by any witnesses that Plaintiff may bring forward at trial, and standing by itself the testimony of Dr. Oliveri does not establish the absence of a genuine issue of fact.

Defendant further asserts that Plaintiff's allegation of willful and wanton misconduct is not supported by the facts and that punitive damages are inappropriate in this case. This claim is offered in support of a motion to dismiss for failure to state a proper claim for relief. However, as with the previous claim, Defendant has introduced matters outside the pleadings, thus making it appropriate to treat this claim as an assertion in support of a motion for summary judgment.

Based upon the materials that have been presented to the Court, I am unable to conclude that Defendant is entitled to judgment as a matter of law regarding punitive damages. Given the Defendant's duty to aid ill passengers, the promulgation of a rule refusing oxygen to passengers until they pass out could conceivably amount to willful and wanton misconduct. This would depend, of course, upon the likelihood of an airline passenger suffering a heart attack, and upon the likelihood of oxygen helping such a passenger if

administered immediately upon request. These are questions of fact that have not been answered by plaintiff's brief's, and which must be left for resolution after a trial.

The defendant has also made a motion to dismiss for lack of a claim for which relief can be granted, asserting that the Civil Aeronautics Board has primary jurisdiction in this case. As the Supreme Court has recently stated, however, the doctrine of primary jurisdiction has no application to a suit filed against an airline where the suit challenges no tariff provision or CAB regulation, and where the suit does not turn upon a question uniquely within the expert and specialized knowledge of the Board. Nader v. Allegheny Airlines, Inc., 44 U.S.L.W. 4803, 4808 (June 7, 1976). In this case, Plaintiff is not challenging a tariff provision or a CAB regulation. Moreover, the question of fact that she poses is not uniquely within the expert and specialized knowledge of the CAB. The right

that the Plaintiff asserts is largely one created by common law, involving factual questions within the ordinary competence of the courts. Consequently, under the facts of this case, the doctrine or primary jurisdiction cannot support Defendant's motion to dismiss for lack of a claim for which relief can be granted.

Defendant also asks this Court to strike material from the complaint that is allegedly immaterial, impertinent and argumentative. The Federal Rules of Civil Procedure have allotted a very narrow function to the motion to strike. According to Rule 12(f), a court may grant such a motion only as to "any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Such motions will be granted only when the challenged matter can have no possible relevance to the subject matter of the suit. U.S. v. Marietta Mfg. Co., 53 F.R.D. 390, 400 (D.C.W. Va. 1971); W. E. Booton, Ltd. v. Scott

& Williams, Inc., 45 F.R.D. 108, 110 (D.C.N.Y. 1968); Warner & Swasey Co. v. Held, 256 F. Supp. 303, 312 (D.C. Wis. 1966). Moreover, even when the challenged material can be deemed immaterial, the motion to strike need not be granted unless the presence of the immaterial allegations can be harmful to the moving party. 2A J. Moore, Federal Practice Par. 12.21, at 2431-33. Because I am not convinced that the challenged material is obviously irrelevant or, even if irrelevant, prejudicial, it is my conclusion that Defendant's motion to strike must be denied.

Finally, I am unable to agree with Defendant's contention that Plaintiff is seeking to involve defendant with the practice of medicine, and that Plaintiff's complaint must for this reason be dismissed as a matter of law. The circumstances under which Defendant would be required to offer aid are so narrow, and the aid which would be offered is so minor that I am unable to distinguish such aid from ordinary first aid.

For the reasons stated above, Defendant's motion to dismiss or, in the alternative, to strike the complaint must be denied.

It is so ordered.

/s/ R. B. Austin
Judge, United States District Court

Dated: Aug 22 1976

Eleanor E. Harris, plaintiff/appellant
vs.
American Airlines and FIREMAN'S FUND
American Life Insurance Company
defendant/appellees.

74 C 3443 LIST OF DOCUMENTS ITEM NO.

Date:	Proceedings;	
11-27-74	Filed Complaint and two copies.....	1
4-8-75	Filed Appearance of defendant, Fireman's Fund American Life Insurance Company and that of Richard F. Johnson as attorney with Rule 39 Affidavit.....	2
4-8-75	Filed defendant's answer..	3
4-11-75	Filed defendant Fireman's Fund American Life Insurance's Notice.....	4
4-14-75	Enter order dated April 11, 1975: Motion of Fireman's Fund American Life Insurance Co. for leave to file appearance and answer instanter granted..	5
4-16-75	Filed plaintiffs' answers to interrogatories.....	6

7-8-75	Filed plaintiff's answers to interrogatories no. 1, etc..7	
7-8-75	Filed plaintiff's answers to interrogatories no. 29, etc.....	8
7-22-75	Filed deposition of Eleanor E. Harris, (one volume)	UNDER SEPARATE CERTIFICATE
10-2-75	Filed deposition of Daniel W. Olivier, M.D.	"
11-7-75	Filed deposition of Ludwig G. Lederer, M.D. (one Volume)	"
11-13-75	Filed deposition of Joseph Rodriguez, (One volume)	"
1-30-76	Filed deposition of Mary B. Craig	"
2-3-76	Filed defendants Motion for Summary Judgment with exhibits.....	9
2-3-75	Filed defendants Memorandum of authorities in support of motion for summary judgment.....	10
2-23-76	Filed plaintiffs notice of filing motion to admit with motion to admit...	11

Judgment entered on June 10 1976 in favor of defendant, Fireman's Fund American Life Insurance Co., is denied. Further ordered that an oral motion of the defendant, Fireman's Fund pursuant to Rule 54(b) of FRCP that the Court expressly determines that there is no just reason to delay the appeal from the Order of June 10, 1976, granting summary judgment and the Court further directs the entry by the Clerk of this Court of final judgment pursuant to the order of June 10. 1976 - Draft-Austin, J.....24

7-19-76 Enter order dated 7-16-76: Order dated July 8, 1976 is amended by vacating the following portion "and the court further directs that entry by the Clerk of this Court of final judgment pursuant to the order of June 10, 1976." In all other respect the order of July 8, 1976 is to stand. - AUSTIN, J...25

7-26-76 Enter order dated 7-21-76: Enter Order and Rule 54(b) certificate (Draft)- Austin, J..... 26

8-16-76 Enter Order of Defendant's American Airline, Motion to Dismiss, or in the Alternative, to strike the Complaint, denied (Captioned "Ruling on Motion".27

8-26-76 Filed Designation of Record (stipulated)..... 28

CONSTITUTIONAL PROVISIONS AND COURT RULES INVOLVED

• • • •

UNITED STATES CONSTITUTION

AMENDMENT VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS

RULE 56. SUMMARY JUDGMENT

(a) FOR CLAIMANT. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) FOR DEFENDANT PARTY. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) MOTION AND PROCEEDINGS THEREON. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to

a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount on damages.

(d) CASE NOT FULLY ADJUDICATED ON MOTION. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(3) FORM OF AFFIDAVITS: FURTHER TESTIMONY: DEFENSE REQUIRED. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed

by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) WHEN AFFIDAVITS ARE UNAVAILABLE. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavits facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other orders as is just.

(g) AFFIDAVITS MADE IN BAD FAITH. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt. (As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963)

RULES OF THE UNITED STATES DISTRICT COURT - NORTHERN DISTRICT

RULE 13. HEARING OF CONTESTED MATTERS

(a) Any moving party filing a contested motion, objections or other matter calling for a decision of the court shall file with the clerk within five days thereof, a short concise memorandum in support of his position, together with citations of authority. The adverse party shall file within ten days thereafter an answering memorandum. The moving party shall within five days thereafter file a reply. Copies of all briefs shall be served upon all other parties and upon the minute clerk of the judge to whom the case is assigned.

(b) Failure to file a supporting or answering memorandum shall not be deemed to be a waiver of the motion or a withdrawal of opposition thereto, but the court on its own motion or that of a party may strike the motion or grant the same without further hearing. Failure to file a reply memorandum within the requisite time shall be deemed a waiver of the right to file.

(c) The court may by order excuse the filing of supporting, answering and reply briefs and may shorten or extend the time fixed by this rule for the filing of briefs.

(d) Any party may on notice provided for by Rule 12(a) hereof call the motion or matter to the attention to the court for decision. When requested, oral argument may be allowed in the court's discretion.

RULES OF THE UNITED STATES DISTRICT COURT - NORTHERN DISTRICT

RULE 9. FORM OF PAPERS FILED

...(d) No brief in support of or in opposition to any motion pending in this Court shall exceed 15 pages without prior approval of this Court....

RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS

RULE 12. DEFENSES AND OBJECTIONS —WHEN AND HOW PRESENTED BY PLEADING OR MOTION— MOTION FOR JUDGMENT ON PLEADINGS.

....

(b) How Presented....

(7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleadings is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleadings or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.....

Docket No. 47969 - Agenda 30 - May, 1976

THE FARMERS AUTOMOBILE INSURANCE ASSOCIATION, Appellant, v. GASTON HAMILTON et al.- (John Hogan, Appellee.)

MR. JUSTICE GOLDENHERSII delivered the opinion of the court:

Defendant John Hogan (hereafter defendant) appealed from the judgment of the circuit court of Williamson County entered upon allowance of plaintiff's, The Farmers Automobile Insurance Association's, motion for summary judgment in its action for declaratory judgment. The appellate court reversed (31 Ill. App. 3d 730), and we allowed plaintiff's petition for leave to appeal.

In its complaint for declaratory judgment, plaintiff alleged that defendant had filed suit against Gaston Hamilton, its insured under a homeowner's policy, to recover damages for personal injuries suffered as the result of Hogan's being shot by Hamilton. The shooting occurred on February 7, 1970, and the suit was filed on February 8, 1971. Although admittedly the homeowners policy was in force and effect at the time of the shooting, plaintiff alleged that it was not obligated to defend Hamilton or pay any judgment recovered by defendant for the reason that it received no notice of the occurrence for more than a year, and that in failing to give notice Hamilton breached the following provision of the policy:

> "In the event of an accident or occurrence, written notice containing particulars sufficient to identify the Insured and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured and of available witnesses, shall be given by or for the Insured to this Company or any of its authorized agents as soon as practicable."

It alleged that compliance with the foregoing provision was "a condition precedent to plaintiff's liability under said policy."

Relying upon an "exclusion" which provided that "[t]his policy does not apply *** to bodily injury or property damage which is either expected or intended from the standpoint of the Insured," plaintiff alleged further that the policy specifically excluded coverage for "bodily injury or property damage which is either expected or intended from the standpoint of the insured" and that the injury allegedly sustained in said occurrence "was, from the standpoint of *** Gaston Hamilton [plaintiff's insured] expected, or intended, or both expected and intended." Plaintiff alleged that it was defending the action brought by defendant against Hamilton under a reservation of rights.

Plaintiff moved for summary judgment and in support of the motion filed the affidavits

of the agent who had written the policy, the manager of its Mt. Vernon branch, its claims adjuster, and its assistant district claims manager, and the discovery deposition of its insured, Hamilton. It appears from the affidavits and the deposition that Hamilton did not give plaintiff notice of the occurrence until he was served with summons shortly after February 8, 1971. It also appears that Hamilton did not know that the occurrence out of which defendant's claim arose was covered under the policy.

The circuit court found that there was no genuine issue as to any material fact and allowed plaintiff's motion for summary judgment. The appellate court, noting that Hamilton had stated in his discovery deposition that he did not know that the homeowner's insurance policy covered the occurrence, held that where the insured, acting as a reasonably prudent person, believed that the occurrence was not covered by the policy, delay in giving notice may be excused and that the record showed that there existed a question of fact whether the delay in giving notice was excusable.

Plaintiff contends that the appellate court erred and argues that "The policy required 'written notice.' Under the pleadings, whether written notice had been given was a material fact. On this material fact there is no dispute. The effect of the Appellate Court opinion is to delete the word "written" from the policy. This the Court cannot lawfully do." It is defendant's position that the question whether Hamilton gave notice of the

shooting "as soon as practicable" is one of fact, dependent upon the circumstances, and that there also exists a genuine issue of fact whether Hamilton's belief that the occurrence was not covered by the policy was reasonable.

In ECONO LEASE, INC. V. NOFF-SINGER, 63 Ill. 2d 390, 393, we said: "A motion for summary judgment will be granted if the pleadings, depositions, admissions and affidavits on file reveal that there is no genuine issue as to any material fact and that the movant is entitled to a judgment or decree as a matter of law. (Ill.Rev.Stat. 1975, ch. 110, par. 57(3); CARRUTHERS V. B. C. CHRISTOPHER & CO., 57 Ill. 2d 376.) A reviewing court must reverse an order granting summary judgment if it is determined that a material question of fact does exist." In BARRINGTON CONSOLIDATED HIGH SCHOOL V. AMERICAN INSURANCE CO., 58 Ill. 2d 278, which involved a notice provision similar to that contained in plaintiff's policy, we said:

> "Provisions in policies stating when the insurer must be notified of a covered occurrence have generally been interpreted to require notification of the company within a reasonable time, considering all the facts and circumstances of the particular case. Decisions illustrating this general holding include WALSH V. STATE FARM MUTUAL

AUTOMOBILE INSURANCE CO., 91 Ill. App. 2d 156; HOFFMAN & KLEMPERER CO. V. OCEAN ACCIDENT & GUARANTY CORP., (7th Cir. 1961), 292 F.2d 324; see also 18 A.L.R. 2d 443, 448 (1951).

Couch's comment on the term used in the policy here for the time of reporting, 'As soon as is practicable' is:'"As soon as practicable" in a policy covering liability for personal injury and property damage means within a reasonable time, and what is a reasonable time depends upon the facts and circumstances of the case.' 13 Couch on Insurance 2d sec. 49:328 (1965); see also 2 Long, The Law of Liability Insurance sec. 13.09 (1974)." 58 Ill. 2d 278, 281-82.

It was Hamilton's duty to give timely notice to plaintiff of any occurrence of injury which would suggest to a reasonably prudent person that a claim for damages might be asserted for which coverage might be provided under his homeowner's policy. (CENTURY INDEMNITY CO. V. SERAFINE (7th Cir. 1963), 311 F.2d 676). Whether Hamilton, acting under the belief that the occurrence was not covered by the policy, acted as a reasonably prudent person in not giving notice until he was served with

summons was a question of fact. CITY OF CHICAGO V. UNITED STATES FIRE INSURANCE CO., 124 Ill. App. 2d 340 (see also Annot. 18, A.L.R. 2d 443, 478 (1951).)

We have noted that in its complaint, plaintiff alleged that, under the provisions of the policy, coverage for the shooting was excluded for the reason that the injury to defendant was "either expected or intended from the standpoint of the insured." Although Hamilton's expectations or intentions may not necessarily be issues in defendant's action against him (see ATCHISON V. DULLAM, 16 Ill. App. 42; KOCLANES V. HERTENSTEIN, 130 Ill. App. 2d 916; 26 A.L.R. 3d 561), the circuit court properly made no finding on this allegation. (MARYLAND CASUALTY CO. V. PEPPERS, Docket No. 47755.) Parenthetically we note that the assertion of the exclusion demonstrates further that there is a fact question whether Hamilton, shown by this deposition to be a retired pipe fitter, while acting as a reasonable person, would not know that coverage was afforded under the policy.

We hold that this record failed to show that there was no genuine issue of any material fact and that the circuit court erred in granting plaintiff's motion for summary judgment. The judgment of the appellate court is affirmed.

Judgment affirmed.

WASHINGTON-SOUTHERN NAVIGATION COMPANY *v.* BALTIMORE & PHILADELPHIA STEAMBOAT COMPANY.

ON CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 108. Argued November 27, 28, 1923.—Decided January 28, 1924.

1. The function of rules of court is to regulate the practice of the court and facilitate the transaction of its business. P. 635.

2. A rule of court cannot enlarge or restrict jurisdiction, or abrogate or modify the substantive law. P. 635.
3. And this limitation applies to the rules prescribed by this Court for inferior tribunals in admiralty cases. *Id.*
4. Admiralty Rule 50 was intended to formulate practice already settled, and is not to be construed as empowering the District Court to stay proceedings on an original libel until the libelant shall give security to respond to a counterclaim, in a case where the original libel is *in personam* and where the cross-libelant has given security voluntarily. Pp. 632, 638.

Questions certified by the Circuit Court of Appeals.

Mr. Arthur E. Weil for Washington-Southern Navigation Company.

Mr. Thomas Raeburn White, with whom *Mr. John Cadwalader, Jr.*, was on the brief, for Baltimore & Philadelphia Steamboat Company.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The Washington-Southern Navigation Company, the charterer of two steamers of the Baltimore & Philadelphia Steamboat Company, filed, in the Eastern District of Pennsylvania, a libel *in personam* against the owner to recover the sum of $120,000 for breach of the charter party. The usual bond for costs was given. No attachment or seizure of the property of the respondent was made or sought. The owner traversed the essential averments of the libel, and also filed a cross-libel in which it sought damages in the sum of $43,443.25. There was no attachment or seizure of person or property under the cross-libel. The essential allegations of the cross-libel were in turn denied by the charterer. Thereafter, the owner moved that the charterer be required to give security to respond in damages on the counterclaim. The

trial court ordered it to do so, provided the owner first gave security to pay the charterer's claim. 271 Fed. 540. This the owner did of his own motion and without compulsion. The charterer did not give the security ordered. Thereupon, the trial court entered a decree staying all proceedings until its order should be obeyed.

The motion and order were based on Rule 50 of the new Admiralty Rules, promulgated December 6, 1920, 254 U. S. 24 (appendix), which amends former Rule 53, 210 U. S. 562, by adding thereto the words italicised, so that it now reads:

Rule 50. "Whenever a cross-libel is filed upon any counterclaim arising out of the same *contract or* cause of action for which the original libel was filed, *and the respondent or claimant in the original suit shall have given security to respond in damages*, the respondent in the cross-libel shall give security in the usual amount and form to respond in damages *to the claims set forth* in said cross-libel, unless the court, for cause shown, shall otherwise direct; and all proceedings on the original libel shall be stayed until such security be given *unless the court otherwise directs.*"

The charterer appealed to the Circuit Court of Appeals. That court, under § 239 of the Judicial Code, asks instruction whether this rule empowers the District Court to stay proceedings in the original suit until the original libelant shall have given security to respond to the counterclaim, in a case where the original libel was *in personam* and the original respondent (the cross-libelant) has given the security voluntarily; that is, of his own motion and without compulsion.

The owner insists that the terms of Rule 50 are so clear that there is no room for a construction different from that given to it by the District Court. But to ascertain the true meaning of the rule, the operation and effect of the construction urged must be considered. Under that given,

a libelant may be automatically barred from prosecuting his suit, merely because he is unable or unwilling to give security to satisfy the claim made in the cross-libel. For, although no security is asked of the original respondent, he may, by voluntarily giving security, effect a stay of all proceedings against himself, "unless the court, for cause shown", directs otherwise.[1] Thus construed, Rule 50 would abrogate the right to proceed in admiralty, and substitute therefor either a conditional right to prosecute the suit, provided libelant gives security to satisfy the counterclaim, or a permission to do so, provided the court, in its discretion, for cause shown, grants leave. Moreover, the circumstances under which alone this loss of the right to sue would occur are whimsical. The original libelant could proceed without giving the security, if the respondent, instead of filing a cross-libel, brought an independent cross-suit. Likewise, if the person who feels himself aggrieved, instead of exercising diligence in prosecuting his claim, exercises self-restraint, and allows the other party to the controversy to commence the hostilities, he may, without giving the security, exercise the right to prosecute his cause of action, either by a cross-libel or by an independent cross-action.[2] An intention to introduce a practice so capricious is not to be lightly imputed.

To ascertain the true meaning of the rule, it must be read, also, in the light of the established admiralty jurisdiction, of the general principles of maritime law, and of the appropriate function of rules of court. Before Rule

[1] Compare *Compagnie Universelle, etc.* v. *Belloni*, 45 Fed. 587; *Old Dominion S. S. Co.* v. *Kufahl*, 100 Fed. 331, 332. It has been said that the burden is upon the original libelant to show why he should be relieved from giving the security. *Empresa Maritima a Vapor* v. *North & South American Steam Nav. Co.*, 16 Fed. 502, 504; *The Transit*, 210 Fed. 575.

[2] Compare *Prince Line* v. *Mayer & Lage*, 264 Fed. 856.

53 was adopted[3], the general practice in admiralty concerning the giving of security had long been settled. Every party—libelant, respondent, claimant, and intervenor—was obliged, or could be required, to give security for costs. No party could be required to give security to satisfy the claim of another. In suits *in personam*, where the mesne process was solely by simple monition in the nature of a summons to appear and answer the suit, no security, except that for costs, was ever given by the respondent. Where the process included a clause for mesne attachment of property, the respondent was not obliged to give any security except for costs; but he could, if he chose, obtain dissolution of the attachment by giving security to pay the amount of the decree against him not exceeding the value of the attached property. Where the mesne process was by warrant of arrest of the person in the nature of a capias, the respondent was, likewise, not obliged to give security for the claim; but he could, if he chose, obtain his release by giving bail to secure his appearance and/or to satisfy the decree. Where the suit was *in rem*, the claimant was under no obligation to give such security; but he could, if he chose, obtain release of the property seized by giving security for its value or for the amount required to satisfy the claims made. Thus, neither respondent, claimant nor intervenor could, as a

[3] Rule 53 was promulgated at the December Term, 1868 (originally Rule 54, 7 Wall. p. v.). This Court first promulgated rules of practice in admiralty in 1844. 3 How. pp. iii to xiv. This was done pursuant to the Act of August 23, 1842, c. 188, §6, 5 Stat. 516, 518. For the earlier legislation see Act of September 24, 1789, c. 20, § 17, 1 Stat. 73, 83; Act of September 29, 1789, c. 21, § 2, 1 Stat. 93, 94; Act of May 8, 1792, c. 36, § 2, 1 Stat. 275, 276; Act of May 19, 1828, c. 68, § 1, 4 Stat. 278. See also *The Steamer St. Lawrence*, 1 Black, 522; *Ward* v. *Chamberlain*, 2 Black, 430. For supplemental rules and amendments of rules made prior to December 6, 1920, see 210 U. S. 544-566.

condition of prosecuting his claim or defence, be compelled to furnish any security other than for costs. And the libelant could never be put into a situation which obliged him to give any other security. Such was still the practice concerning the giving of security for claims prosecuted in admiralty (except as modified by Rule 53) when Rule 50 was incorporated in the revision of December 6, 1920.[4]

The construction given to Rule 50 by the District Court would, by imposing an impossible or onerous condition, deprive many litigants of the right to prosecute their claims in admiralty. Among others, it would, if applied generally, deny this right to seamen, upon whom, regardless of their means or nationality, Congress, shortly before the adoption of Rule 50, had conferred the right to prosecute their claims, in both trial and appellate courts, without giving security even 'for costs.'[5] It would likewise deny to poor citizens of the United States the right to proceed in admiralty, which Congress had by successive acts sought to ensure, in order to relieve litigants from dependence upon the judicial discretion theretofore incident to leave

[4] See Rules of 1844. Nos. 25, 26, 34, 3, 4, 10, 11; Conkling, Admiralty (1848), part 2, c. 4; Benedict, Admiralty (1850), c. 27. Act of March 3, 1847, c. 55, 9 Stat. 181; Act of March 2, 1867, c. 180, 14 Stat. 543; *Manro* v. *Almeida*, 10 Wheat. 473; *Atkins* v. *Disintegrating Co.*, 18 Wall. 272; *Bouysson* v. *Miller*, Bee's Adm. 186; *Lane* v. *Townsend*, 1 Ware, 286; *Smith* v. *Mln*, Abbott, Adm. 373, *Louisiana Insurance Co.* v. *Nickerson*, 2 Low. 310; *Stone* v. *Murphy*, 86 Fed. 158; *Lyons Co.* v. *Deutsche Dampschiffahrts-Gesellschaft Kosmos*, 243 Fed. 202.

[5] Acts of July 1, 1916, c. 209, § 1, 39 Stat. 262, 316; June 12, 1917, c. 27, 40 Stat. 105, 157; *Ex parte Abdu*, 247 U. S. 27; Act of July 1, 1918, c. 113, § 1, 40 Stat. 634, 683. See *The Memphian*, 245 Fed. 464.

Before the enactment of these statutes, it had been held in regard to all suits in admiralty between foreigners, that the court might, in its discretion, decline to take jurisdiction. *The Belgenland*, 114 U. S. 355, 361-364.

to sue *in forma pauperis*.[6] The right of a citizen of the United States to sue in a court having jurisdiction of the parties and of the cause of action includes the right to prosecute his claim to judgment. *Illinois Central R. R. Co.* v. *Adams*, 180 U. S. 28, 34; *McClellan* v. *Carland*, 217 U. S. 268, 281. Obviously, it was not the intention of this Court, in adopting the rule, to disregard the right of seamen, of poor persons or of others to prosecute suits in admiralty. The function of rules is to regulate the practice of the court and to facilitate the transaction of its business. This function embraces, among other things, the regulation of the forms, operation and effect of process; and the prescribing of forms, modes and times for proceedings. Most rules are merely a formulation of the previous practice of the courts. Occasionally, a rule is employed to express, in convenient form, as applicable to certain classes of cases, a principle of substantive law which has been established by statute or decisions. But no rule of court can enlarge or restrict jurisdiction. Nor can a rule abrogate or modify the substantive law. This is true, whether the court to which the rules apply be one of law, of equity or of admiralty. It is true of rules of practice prescribed by this Court for inferior tribunals, as it is of those rules which

[6] Act of July 20, 1892, c. 209, § 1, 27 Stat. 252; *Bradford* v. *Southern Ry. Co.*, 195 U. S. 243; Act of June 25, 1910, c. 435, 36 Stat. 866; *Kinney* v. *Plymouth Rock Squab Co.*, 236 U. S. 43. And see Act of June 27, 1922, c. 246, 42 Stat. 666. For the general requirement in admiralty concerning stipulations for costs, see *Rawson* v. *Lyon*, 15 Fed. 831. For the limitations there upon permission to sue *in forma pauperis* prior to the legislation, see *Polydore* v. *Prince*, 1 Ware, 410; *The Ship Great Britain*, Olcott, 1; *Wheatley* v. *Hotchkiss*, 1 Sprague, 225, 227; *The Schooner Caroline and Cornelia*, 2 Ben. 105; *Cole* v. *Tollison*, 40 Fed. 303. For limitations remaining after the Act of 1892, see *Donovan* v. *Salem & P. Nav. Co.*, 134 Fed. 316; *The Pere Marquette* 18, 203 Fed. 127, 133.

lower courts make for their own guidance under authority conferred.[7]

It remains to consider the purpose of Rule 50. The cross-libel, unlike the cross-bill in equity, is of recent origin. This simple device in aid of the administration of justice was not established in the English courts of admiralty until, under the name of crose-cause, it was authorized by the Admiralty Court Act of 1861, 24 and 25 Vict., c. 10, § 34. Theretofore, that court considered itself without power even to compel consolidation of independent cross-suits or to stay one to await proceedings in the other. Moreover, where the original libel was filed by a non-resident libelant, substituted service in a cross-action, by serving his proctor, was not permitted, until this was authorized by a rule of court adopted in 1859.[8] In American courts of admiralty the practice was more liberal. Set-off being of statutory origin and not expressly authorized in admiralty, was rejected here as in England.[9] But Congress conferred upon all federal courts, in 1813, the right to compel consolidation of causes. *The*

[7] *Ward* v. *Chamberlain*, 2 Black, 430, 435–437; *Hudson* v. *Parker*, 156 U. S. 277, 284; *Venner* v. *Great Northern Ry. Co.*, 209 U. S. 24, 33-34; *Davidson Marble Co.* v. *Gibson*, 213 U. S. 10, 18. See also *Mills* v. *Bank of the United States*, 11 Wheat. 431, 439–440; *Patterson* v. *Winn*, 5 Pet. 233, 243; *The Steamer St. Lawrence*, 1 Black, 522, 530; *Life Insurance Co.* v. *Francisco*, 17 Wall. 672, 679; *The Lottawanna*, 21 Wall. 558, 579; *The Corsair*, 145 U. S. 335, 342; *Saylor* v. *Taylor*, 77 Fed. 476, 480.

[8] See *The Rougemont*, (1893) P. 275, 276–279; Williams & Bruce, Admiralty Jurisdiction and Practice (3rd ed.), 108, 370-371. Compare Coote, Admiralty Practice (1860), 28, 133. But the court did, in some cases, stay payment on the execution. Compare *The Seringapatam*, 3 W. Rob. 38, 44; *The North American*, Lush. 79.

[9] The rule of law stated by Mr. Justice Story in *Willard* v. *Dorr*, 3 Mason, 161, that recoupment is permissible, but that set-off is not, has been strictly adhered to since. See *The Two Brothers*, 4 Fed. 158; *The Frank Gilmore*, 73 Fed. 686; *Anderson* v. *Pacific Coast Co.*, 99 Fed. 109, 111; *United Transp. & Lighterage Co.*, v. *New York & Baltimore Transp. Line*, 180 Fed. 902.

North Star, 106 U. S. 17, 27. Later, our admiralty courts recognized the propriety of affording affirmative relief by a cross-libel, in analogy to the cross-bill in equity.[10] The procedure on cross-libels and their scope remained, however, unsettled.[11]

Rule 53 was doubtless suggested by § 34 of the English Admiralty Court Act.[12] By that provision, the court was authorized, in certain cases, to suspend proceedings in the original cause until security had been given to answer judgment in the "cross cause."[13] The power was in its

[10] The earliest reported case in which the right to file a cross-libel (as distinguished from a cross-action) was definitely recognized appears to be *Snow* v. *Carruth*, 1 Sprague, 324, 327 (1856). Compare *The Hudson*, Olcott, 396 (1846); *Ward* v. *Ogdensburgh*, 5 McLean, 622 (1853); *Kennedy* v. *Dodge*, 1 Ben. 311, 316 (1867).

[11] *Ward* v. *Chamberlain*, 21 How. 572, 574 (1858), declared that on the cross-libel process must be taken out and served in the usual way. See *The Ping-On* v. *Blethen*, 11 Fed. 607, 611; *The Edward H. Blake*, 92 Fed. 202, 206. *Nichols v. Tremlett*, 1 Sprague, 361, 365 (1857), held that substituted service of the cross-libel could not be made upon the proctor of an original non-resident libelant; but that the court had power to compel submission to the jurisdiction by staying proceedings on the original libel until an appearance was entered on the cross-libel. The power to order substituted service of the cross-libel on the proctor of a non-resident libelant was still considered debatable in 1894. *The Eliza Lines*, 61 Fed. 308, 322–324. See also *The Sapphire*, 18 Wall. 51, 52, 56; *The Dove*, 91 U. S. 381; *Bowker* v. *United States*, 186 U. S. 135, 140.

[12] See *Old Dominion S. S. Co.* v. *Kufahl*, 100 Fed. 331.

[13] 24 & 25 Vict., c. 10, § 34. "The High Court of Admiralty may, on the application of the defendant in any cause of damage, and on his instituting a cross cause for the damage sustained by him in respect of the same collision, direct that the principal cause and the cross cause be heard at the same time and upon the same evidence; and if in the principal cause the ship of the defendant has been arrested or security given by him to answer judgment, and in the cross cause the ship of the plaintiff cannot be arrested, and security has not been given to answer judgment therein, the Court may, if it think fit, suspend the proceedings in the principal cause, until security has been given to answer judgment in the cross cause." The same provision was introduced in Ireland in 1867, 30 and 31 Vict., c. 114, § 72.

terms limited to cases in which the ship of the original defendant had been arrested or he had given bail. The courts held that the act does not apply where the original libel was *in personam*;[14] and that in actions *in rem*, it had, thereunder, no power to order a stay where there had been no arrest and the defendant had given bail voluntarily.[15] Rule 53 did not so limit the power to suits *in rem*. For, while process in the nature of foreign attachment in suits *in personam* fell into disuse in England, it had become the established practice in this country.[16] Neither was Rule 53 in terms limited to suits where the original libelant had made an arrest or attachment. But, although it remained in force, unmodified, for more than half a century, no reported case discloses that a stay was ordered under it, except where the original respondent had been obliged to give security in order to obtain release of the ship or of attached property.[17] Here, as in England, the purpose of the provision was declared to be to place the parties on an

[14] *The Amazon*, 36 L. J. Adm. (N. S.) 4; *The Rougemont*, (1893) P. 275, 276-279; 1 Halsbury, Laws of England, 95, note (*s*).

[15] *The Alne Holme*, 4 Asp. 591.

[16] *Manro* v. *Almeida*, 10 Wheat. 473; *Atkins* v. *Disintegrating Co.*, 18 Wall. 272; *Louisiana Insurance Co.* v. *Nickerson*, 2 Low. 310; *Rosasco* v. *Thompson*, 242 Fed. 527. Compare Williams & Bruce, Admiralty Jurisdiction & Practice (3rd ed.), 19; Roscoe, Admiralty Practice (3rd ed.), 44, note (*c*).

[17] In *Franklin Sugar-Refining Co.* v. *Funch*, 66 Fed. 342, 343, it was doubted whether Rule 53 applied where the original libel was *in personam* and no security was exacted. In the following cases *in rem*, in which the stay was ordered, the original libelant had caused the ship to be arrested. *The Toledo*, 1 Brown Adm. 445; *The George H. Parker*, 1 Flippin, 606; *Vianello* v. *The Credit Lyonnais*, 15 Fed. 637; *Empresa Maritima a Vapor* v. *North & South American Steam Nav. Co.*, 16 Fed. 502; *The Electron*, 48 Fed. 689; *The Highland Light*, 88 Fed. 296; *Old Dominion S. S. Co.* v. *Kufahl*, 100 Fed. 331; *Jacobsen* v. *Lewis Klondike Expedition Co.*, 112 Fed. 73; *The Gloria*, 267 Fed. 929; 286 Fed. 188; *The F. J. Luckenbach*, 267 Fed. 931; 286 Fed. 188. In the following cases in which the stay was ordered the suit

equality as regards security.[18] And, under it, security to satisfy the counter claim could not be exacted by means of a stay, unless the original libelant had compelled the giving of such security to satisfy his own claim.

The new phrases introduced in Rule 50 were not designed to introduce any new practice concerning cross-libels. Their purpose was to formulate the practice which had become settled. This is true of those relating to the giving of security, as it is of those concerning the character

was *in personam*, but respondent's property was attached. *Compagnie Universelle, etc.* v. *Belloni*, 45 Fed. 587 (see 123 Fed. 332, 333); *Lochmore S. S. Co.* v. *Hagar*, 78 Fed. 642. In *Genthner* v. *Wiley*, 85 Fed. 797, the original papers disclose that no attachment was made or bond given; and that, after the order, the bill and cross-bill were dismissed by agreement. In the following cases where the original suit was *in personam*, the stay was denied in the exercise of discretion. *Franklin Sugar-Refining Co.* v. *Funch*, 66 Fed. 342; 73 Fed. 844; *Morse Ironworks & Dry Dock Co.* v. *Luckenbach*, 123 Fed. 332; *Chesbrough* v. *Boston Elevated Ry. Co.*, 250 Fed. 922; *Interstate Lighterage & Transp. Co.* v. *Newtown Creek Towing Co.*, 259 Fed. 318; *Prince Line* v. *Mayer & Lage*, 264 Fed. 856. Also in *The Transit*, 216 Fed. 575. In *The Steamer Bristol*, 4 Ben. 55, the stay was denied because the cross-action was *in rem*, the vessel was without the jurisdiction, and process was not served on the cross-respondent. In *Crowell* v. *The Theresa Wolf*, 4 Fed. 152, and *Southwestern Transp. Co.* v. *Pittsburg Coal Co.*, 42 Fed. 920, the stay was denied because the counterclaim was not a proper subject for a cross-libel. See also *The Owego*, 289 Fed. 263.

[18] *The Cameo*, Lush, 408, 409; *The Charkieh*, L. R. 4 A. & E. 120, 122; *The Newbattle*, 10 P. D. 33, 35. See also *The Breadalbane*, L. R. 7 P. D. 186, 187 (1881); *The Helenslea*, L. R. 7 P. D. 57, 59 (1882); *The Stoomvaart Maatschappy Nederland* v. *P. & O. S. N. Co.*, L. R. 7 A. C. 795, 821 (1882); *The Alexander*, 5 Asp. 89 (1883); *The Rougemont* (1893) P. 275; *Imperial Japanese Government* v. *P. & O. S. N. Co.*, (1895) A. C. 644, 659-60; *The James Westoll* (1905) P. 47, 51. Williams & Bruce, Admiralty Jurisdiction & Practice (3rd ed), 108, 370.

In *Empresa Maritima a Vapor* v. *North & South American Steam Nav. Co.*, 16 Fed. 502, 504, Judge Addison Brown said: "The object of rule 53, I cannot doubt, was that in cases of cross-demands upon the

of the claims which may be asserted by means of a cross-libel.[19] The answer to the question of the Circuit Court of Appeals is *No.*

same subject of litigation both parties should stand upon equal terms as regards security. It was designed, where the libelants in a suit *in rem*, through the arrest of the property, exact and obtain security for their own demand, that in a cross-suit *in personam* for a counterclaim in respect to the same subject of litigation, the defendants in the former suit should likewise be entitled to security for the payment of their demands, in case the decision of the court upon the point in controversy should be in their favor. The rule was designed to correct the inequality and injustice of the process of court *in rem* being used to obtain security in favor of one party, in reference to a single subject of dispute, while it was denied to the other."

[19] Compare *Bowker* v. *United States*, 186 U. S. 135, 141; *Vianello* v. *The Credit Lyonnais*, 15 Fed. 637; *The C. B. Sanford*, 22 Fed. 863; *The Zouave*, 29 Fed. 296; *The Electron*, 48 Fed. 689; *Genthner* v. *Wiley*, 85 Fed. 797; *The Highland Light*, 88 Fed. 296; *George D. Emery Co.* v. *Tweedie Trading Co.*, 143 Fed. 144; *The Venezuela*, 173 Fed. 834; *United Transp. & Lighterage Co.* v. *New York & Baltimore Transp. Line*, 180 Fed. 902; 185 Fed. 386; *The Alliance*, 236 Fed. 361. See also *Brooklyn & N. Y. Ferry Co.* v. *The Morrisania*, 35 Fed. 558; *The Medusa*, 47 Fed. 821.

SEASON-ALL INDUSTRIES, INC., a corporation, Appellant,
v.
TURKIYE SISE VE CAM FABRIKALARI, A. A., a corporation, and Seaply Glass Corporation, a corporation.
No. 18014.

United States Court of Appeals,
Third Circuit.
Argued Dec. 19, 1969.
Decided April 22, 1970.

Action was brought by glass buyer against glass distributor and manufacturer to enjoin arbitration proceedings which distributor had begun and for an accounting. The United States District Court for the Western District of Pennsylvania, Edward Dumbauld, J., entered a summary judgment in favor of the defendant distributor and manufacturer and the buyer appeals. The Court of Appeals, Freedman, Circuit Judge, held, inter alia, that where record showed that defendant glass distributor sought arbitration on only two of the twelve orders involved in dispute, distributor and manufacturer were not entitled to summary judgment of dismissal on ground that buyer was bound by the two invoice provisions relating to duty to arbitrate, and the defendants did not sustain their burden of showing that no genuine issue of fact existed.

Order vacated and case remanded.

1. Federal Civil Procedure 2533

Defendant's motion to dismiss which contained factual allegations which were not already on record was properly treated as a motion for summary judgment. Fed. Rules Civ. Proc. rule 12(b), 28 U.S.C.A.

2. Federal Civil Procedure 2533

Defendant's Motion for judgment on the pleadings was properly treated as a motion for summary judgment where there had been no answer filed to complaint. Fed. Rules Civ. Proc. rule 12(c), 28 U.S. C.A.

3. Federal Civil Procedure 2470

Party's right to trial may not be cut off by summary judgment if a genuine issue of fact exists whose resolution in his favor on a trial would bar entry of judgment against him. Fed. Rules Civ. Proc. rule 56, 28 U.S.C.A.

4. Contracts 292 1/2

Defendant is not entitled to stay civil action on contract because it contains a provision for arbitration which he refuses to invoke.

5. Contracts 284 (2)

Where record showed that defendant

glass distributor, sued by buyer for breach of contract, sought arbitration on only two of the twelve orders involved in dispute, arbitration clause of invoices did not preclude buyer from maintaining the action.

6. Federal Civil Procedure 2492

District court, which did not decide jurisdictional question with respect to defendant glass manufacturer, which was being sued by buyer for breach of contract and which asserted that jurisdiction was not acquired over it by service under the Pennsylvania long-arm statute, should not have granted summary judgment dismissing claim of buyer on ground of arbitration clause of invoices where there was nothing in order which showed manufacturer's agreement to be bound by arbitration provision.

7. Federal Civil Procedure 2492

Action by glass buyer against distributor and manufacturer for breach of contract was peculiarly one in which a summary judgment should not have been entered in favor of the distributor and manufacturer until the buyer had obtained decision on the protective motions of both defendants so that if motions were denied buyer would have benefit of record containing factual version of each defendant who asserted that buyer was bound to arbitrate claims. Fed. Rules Civ. Proc. rule 56(c), 28 U.S.C.A.

8. Federal Civil Procedure 2531

Rule relating to procedure for determining motion for summary judgment does not comtemplate that motion should be disposed of on briefs, at least until moving and adverse parties have had opportunity to file their respective supporting and answering affidavits, and to supplement them if necessary. Fed. Rules Civ. Proc. rule 56 (c), 28 U.S.C.A.

9. Federal Civil Procedure 2470, 2471

Summary judgment is not punishment for incoherence of a pleading and such preliminary dismissal of action without trial is to be made only if it clearly appears there is no genuine issue of fact to be decided. Fed. Rules Civ. Proc. rule 56(c), 28 U.S.C.A.

10. Federal Civil Procedure 2547

Generally, it is undesirable for district court to enter summary judgment after receiving briefs and without holding hearing unless it makes it clear in its order that all affidavits and counteraffidavits must be filed with briefs. Fed. Rules Civ. Proc. rules 43(e), 78, 23 U.S.C.A.; U. S. Dist. Ct. Rules W. D. Pa., rule 4(a), par. 2.

11. Federal Civil Procedure 2547

At least as a matter of good practice, resort should not be made to rule authorizing

court to expedite business by providing for a submission and determination of motions without oral hearing on a motion for summary judgment unless it is made clear that parties must present their affidavits and counteraffidavits in addition to whatever facts appear in pleadings, depositions, answers to interrogatories and admissions on file, as only then would it be proper to determine whether genuine issue of fact exists. Fed. Rules Civ. Proc. rules 43(e), 78, 28 U.S.C.A.; U. S. Dist. Ct. Rules W. D. Pa., rule 4(a), par. 2.

12. Federal Civil Procedure 2544

Defendant glass importer and distributor and defendant manufacturer, sued for breach of contract by buyer who was allegedly required by terms of some invoices to arbitrate any claims, failed to carry burden of showing there existed no genuine issue of fact regarding alleged duty to arbitrate. Fed. Rules Civ. Proc. rule 56(c), 28 U.S.C.A.

Joseph A. Katarincic, Kirkpatrick Lockhart, Johnson & Hutchinson, Pittsburgh, Pa. (J. Richard Lauver, Pittsburgh, Pas., on the brief, for appellant.

Harold Gondelman, Baskin, Boreman, Sachs, Gondelman & Craig, and John M. Feeney, Pittsburgh, Pas., for appellees.

Before McLAUGHLIN, FREEDMAN and ADAMS, Circuit Judges.

OPINION OF THE COURT

FREEDMAN, Circuit Judge

This essentially simple case comes to us on a record which is obscure on the ultimate question whether there exists a genuine issue of fact which forbids the entry of summary judgment for the defendants.

This is a diversity action. Plaintiff, a Pennsylvania corporation, sued Seaply Glass Corporation, a New York corporation, which imported and distributed glass, and the Turkiye Sise Ve Cam Fabrikalari A.S., A Turkish Corporation, whose principal office is in Turkey, which manufactured glass imported and distributed by Seaply. The plaintiff sought to enjoin an arbitration proceeding which Seaply had begun against it before the American Arbitration Association, and also sought an accounting.

The complaint alleged that the defendants from time to time alone or in concert sold glass to plaintiff and entered into contracts with plaintiff "with respect to the disposition of claims which plaintiff had against either or both of them, and which agreements defendants have breached."

[1] Seaply filed a motion to dismiss. The motion was sworn to by its president and contained as exhibits a series of "Order Acknowledgements" for sales of glass by Seaply to plaintiff from October 1967 to October 1968. Turkiye is listed in most, but not all, of these

orders as the supplier. The orders state that Seaply was action "as agent only for a foreign principal whose identity has been disclosed," that acceptance of the order would become effective only on approval by the principal, and that Seaply's liability was limited to the use of reasonable care in transmitting the order to the foreign principal for acceptance. The orders then provide: "Any controversy arising from this sale shall be settled by and in accordance with the rules of the American Arbitration Association in New York." Seaply's motion to dismiss averred that it had filed a demand for arbitration of the controversy between the parties with the American Arbitration Association, and attached a copy of the demand for arbitration. Since the motion contained factual allegations which were not already on the record, it was properly treated under Rule 12(b) as a motion for summary judgment.

[2] The other defendant, Turkiye, filed a motion for judgment on the pleadings because it was not subject to service under Pennsylvania's long-arm statute, because on the merits the complaint alleged no contract between plaintiff and Turkiye and no breach of a contract by Turkiye, and because Turkiye was not a party in the arbitration proceeding which plaintiff was seeking to enjoin. Since no answer had been filed to the complaint the motion for judgment on the pleadings was improper as such, and it was rightly treated by the court as a motion for summary judgment (see Rule 12(c)).

Additional factual matter was brought on the record by plaintiff's answers to Seaply's interrogatories. They suffer from a complicated brevity which renders it difficult to isolate clearly their factual content. They do, however, indicate that there were defects in glass shipped and discussions by plaintiff with representatives of Seaply regarding settlement.[1]

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1. The substance of plaintiff's answers to Seaply's interrogatories appears in paragraph 2(a)- there is no 2(b)- which reads as follows:

"In the period of approximately November 16 to November 26, 1968, certain discussions took place including Mr. Booth, Frank Gorell and Franklyn R. Gorell in Indiana, Pennsylvania. At that time, the discussions involved compensation or adjustments for defective glass furnished by shipment on the ship 'Notos' as well as 'Neptune.' No agreement was reached with respect to replacement of 16 carloads of defective glass shipped on the 'Notos.' Mr. Booth, on behalf of defendant Seaply, acquiesced in paying for defective glass removed from the cars and on the premises of defendant and which was shipped on the 'Notos'. In addition, defendant Seaply, through its President, Mr. Booth, in the course of those discussions indicated that the dispute would be resolved by (1) credits

In this state of the record and while interrogatories directed by plaintiff to Seaply and Turkiye separately were still unanswered and motions for protective orders by both Seaply and Turkiye were pending, the court, on May 9, 1969, entered ex parte on Seaply's motion for summary judgment and its motion for a protective order and on Turkiye's motion for judgment on the pleadings what is apparently a standard form of order. It required the moving parties to file their briefs within 10 days, and curiously enough, "dismissed" the motions for want of timely prosecution if the briefs were not so filed, and if timely filed provided that the "dismissal" should then be vacated "and the court shall make a further

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to plaintiff for defective glass delivered prior to the 'Notos' shipment; (a) claims against the insurance carrier without any regard to when the defect arose including defect in manufacture; and, (3) he, Mr. Booth, further agreed that he would assist plaintiff in any litigation that it would pursue against the other defendant to this action, namely, Turkiye Sise Ve Cam Fabrikalari, A.S. It was then left to the plaintiff that he could either seek credits against defendant Seaply, attempt to recover all losses including the 16 carloads on 'Notos' by insurance claim or by proceeding in a lawsuit against the other defendant in this suit. The plaintiff elected the credits."

order disposing of said motion or directing what further proceedings shall be had with regard thereto."[2] Although it is not noted on the docket entries, the defendants' briefs apparently were filed within the prescribed time, and on June 5, 1969, the court entered another ex parte order reciting their timely filing and directed plaintiff to file its brief in opposition within five days. The order provided that plaintiff's failure to file its brief in time would be treated as its consent to the relief sought by the motions, but if it was so filed "the Court shall make a further order disposing of said motion or directing what further proceedings shall be had with regard thereto." On June 27, 1969, plaintiff's brief

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2. The order reads as follows:

> "IT IS ORDERED that the moving party file within ten days from the date of this order a brief in support thereof; and that if said brief be not filed within said period of time, the said motion be and the same is dismissed and overruled and the relief prayed for therein denied, for want of timely prosecution; provided that if the said brief be filed within said period of time, such dismissal and denial shall thereup be vacated and cease to be operative or in force, and the Court shall make a further order disposing of said motion or directing what further proceedings shall be had with regard thereto."

apparently having been filed, the court entered another ex parte order in which it recited the filing of briefs on both sides and granted defendants' motion for summary judgment, dismissed the action and declared Seaply's motion for protective order moot.[3] The basis of the court's decision apparently was that plaintiff conceded that it had purchased all the glass involved on orders which contained the arbitration clause, and that this bound the parties to arbitration of their dispute regardless whether it arose directly from the sale or from negotiations which sought to resolve the controversies which arose from the sale.

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3. This is our construction of the court's order. In fact, its language is more indirect and reads:

"IT IS ORDERED that defendants' motions [not specifying which] be and the same hereby are granted, and plaintiff's action dismissed; the motion of Seaply Glass Corporation [apparently the motion for a protective order] hereby becoming moot."

[3] It is, of course, fundamental that summary judgment, which denies to a litigant his right to a trial, is to be granted only in a clear case. A party's right to trial, therefore, may not be cut off by a summary judgment if a genuine issue of fact exists whose resolution in his favor on a trial would bar the entry of judgment against him.[4] Since the 1963 amendment to Rule 56, we have fully applied the principle authorizing summary judgment if it is clear from the examination of the pleadings, affidavits, answers to interrogatories and depositions on the record, that no genuine issue of fact exists.[5]

[4,5] The foundation of the court's decision is its statement that "it appears to be conceded by plaintiff that all glass sold to plaintiff was sold pursuant to invoices containing the [arbitration] clause." Plaintiff vigorously denies making any such concession. The record, which alone must guide us, shows that Seaply's demand for arbitration covered at the most but two of the 12 orders which Seaply attached to its motion to dismiss. On the face of the record, therefore, no arbitration

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4. United States v. Diebold, Inc., 369 U.S. 654, 82 S. Ct. 993, 8 L.Ed. 2d 176 (1962); First National Bank of Washington v. Langley-Howard, Inc., 391 F.2d 207 (3 Cir. 1968)

5. See Lockhart v. Hoenstine, 411 F.2d 455, 458 (3 Cir. 1969); Robin Construction Com-

proceeding had been invoked by Seaply on the other 10 orders. A defendant, of course, is not entitled to stay a civil action on a contract because it contains a provision for arbitration which he refuses to invoke. Thus, even if it be assumed, as the court held, that the subsequent settlement discussions are included in the provision for arbitration of "Any controversy arising from this sale,"[6] the record does not show that Seaply sought arbitration on any but two of the 12 orders.

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pany v. United States, 345 F.2d 610, 612-614 (3 Cir. 1965).

6. See generally, e. g., American Home Assurance Co. v. American Fidelity & Cas. Co., 356 F.2d 690 (2 Cir. 1966); Kanmak Mills v. Society Brand Hat Co., 236 F.2d 240, 250 (8 Cir. 1956); Galveston Maritime Ass'n. v. South Arlantic & Gulf Coast Dist. 234 F.Supp. 250, 251-252 (S.D.Tex. 1964); Application of Reconstruction Finance Corp., 106 F. Supp. 358, 361-362 (S.D.N.Y.1952), aff'd. R. F. C. v. Harrison & Crosfield, 204 F.2d 366 (2 Cir.), cert. denied 346 U.S. 854, 74 S. Ct. 69, 98 L. Ed. 368 (1953)

[6] There is even less support for the summary judgment in favor of Turkiye. First, the district court did not decide the jurisdictional question, in the absence of which it is difficult to see why a decision on the merits was reached.[7] Moreover, there is nothing in the orders naming Turkiye as a supplier which shows its agreement to be bound by the arbitration provision, a view which is confirmed by the fact that Seaply alone demanded arbitration and Turkiye is not a party in the arbitration proceeding. Nor does Turkiye appear to have been involved in the settlement discussion so tantalizingly mentioned in plaintiff's answers to Seaply's interrogatories. Indeed, these answers allege that Seaply agreed to assist plaintiff in any litigation it would pursue against Turkiye, thus indicating that litigation and not arbitration was the route which they expected plaintiff to take against Turkiye.

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7. See Schramm v. Oakes, 352 F. 2d 143, 149 (10 Cir. 1965); Arrowsmith v. United Press International, 320 F. 2d 219, 221 (2 Cir. 1963); 5 Wright & Miller, Federal Practice and Procedure § 1351 at 563 (1969)

[7] Finally, in view of the obscurity in the record regarding the facts which are touched on in the complaint and plaintiff's answers to Seaply's interrogatories, we believe the case is peculiarly one in which summary judgment should not have been entered until plaintiff obtained a decision on the protective motion of both Seaply and Turkiye so that if the motions were denied plaintiff would have the benefit of a record containing the factual version of each defendant.[8]

[8,9] The state of the record also leads to a consideration of the procedure followed in this case. Apparently it is the practice of the district court where a motion for summary judgment is filed to order the moving party to file his brief and on its receipt, if there is some prima facie showing, to require the opposing party to file his brief. The orders set no time for a hearing, although Rule 56(c) requires that a motion for summary judgment must be served at least 10 days before the time "fixed for the hearing," and authorizes the adverse party to serve opposing affidavits "prior to the day of hearing." The rule does not contemplate that a motion for summary judgment shall be disposed of on briefs, at least until the moving and adverse

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8. See Bane v. Spencer, 393 F.2d 108, 108 (1 Cir. 1968); Toebelman v. Missouri-Kansas Pipe Line Co., 130 F.2d 1016, 1022 (3 Cir. 1942). Rule 56(c) was amended in 1963 to expressly include "answers to interrogatories" within the range of materials to be considered by the trial court on motion for summary judgment.

parties have had an opportunity to file their respective supporting and answering affidavits, and to supplement them if need be. Here in a factually murky situation, with plaintiff's efforts to obtain answers to its interrogatories and to take depositions balked by motions for protective orders which were undecided, it was error to enter summary judgment. It is true that on the record as it stood the court was presented with an almost incoherent and contradictory statement of facts in plaintiff's answers to Seaply's interrogatories. But summary judgment is not a punishment for the incoherence of a pleading and such a preliminary dismissal of an action without trial is to be made only if it clearly appears that there is no genuine issue of fact to be decided.

[10,11] Moreover, we believe that it is undesirable in general for a district court to enter summary judgment after receiving briefs and without holding a hearing unless it makes clear in its order that all affidavits and counter-affidavits must be filed with the briefs.[9]

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9. See generally Georgia Southern & F. Ry. Co. v. Atlantic Coast Line R. Co., 373 F.2d 493, 496-498 (5 Cir.), cert. denied

It is true that the last paragraph of Rule 78 authorizes a court to expedite its business by a "provision by rule or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition."[10] We need not decide whether this provision is applicable to a motion for summary judgment,[11] which if granted disposes with finality of a claim or a defense.[12] At the least, as a matter of good practice, we believe resort should not be had to this provision on a motion for summary judgment unless it is made clear beyond all doubt that the parties must present their affidavits and counter-affidavits in addition to whatever facts appear in the pleadings, depositions,

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389 U.S. 851, 88 S.Ct. 69, 19 L.Ed. 2d 120 (1967); Dredge Corp v. Penny, 338 F.2d 456, 461-462 (9 Cir. 1964); Enochs v. Sisson, 301 F.2d 125 (5 Cir. 1962).

10. See also Rule 43(e).

11. Plaintiff argues that in view of Local Rule 4(a) (2) of the Western District of Pennsylvania it had a right to expect notification of a time and place of argument on the defendants' motions. The relevant paragraph of Local Rule 4(a) (2) reads:

> Miscellaneous Motions: These are motions which require notice and a copy thereof to be served on the opposing party or counsel, together with an acceptance of service thereof. The notice shall set forth the time when said motion will be filed with the Clerk of Court. In the event the motion is not consented to by all parties, the Clerk shall thereafter place same on the next appropriate Argument List and sufficient notice in advance shall be given by the Clerk as to the time and place of said Argument."

Due to our disposition of this case, we need not decide the effect of this local rule on individual orders entered by the court.

12. See Hazen v. Southern Hills National Bank of Tulsa, 414 F.2d 778, 780 (10 Cir. 1969); Sarelas v. Porikos, 320 F.2d 827 (7 Cir. 1963), cert. denied 375 U.S.

answers to interrogatories, and admissions on file. Only then will it be proper to determine whether a genuine issue of fact exists which requires a trial. In the usual case it is more appropriate to set a motion for summary judgment down for hearing as Rule 56(c) provides, and to make the date of hearing the time limit for both sides in the presentation of their factual claims. Indeed, it is only in this way that a full opportunity can be afforded for compliance with the provision of Rule 56(c) authorizing the adverse party to serve opposing affidavits "prior to the day of hearing".

[12] The burden was on the moving parties to demonstrate that on the record they were entitled to summary judgment because it was clear that there existed no genuine issue of fact, and any doubt must be resolved against them.[13] This burden was not satisfied by the present obscure record which makes it impossible to say that no genuine issue of fact exists.

The order of the district court, therefore, will be vacated and the case remanded for further proceedings.

985, 84 S.Ct. 519, 11 L.Ed. 2d 473 (1964) Bagby v. United States, 199 F.2d 233 (8 Cir. 1952); 6 Moore, Federal Practice Par. 56.14 [1] at 2258 (2d ed. 1966). Compare cases cited supra, n. 9.

13. Lockhard v. Hoenstine, 411 F.2d 455-458 (3 Cir. 1969); Janek v. Celebrezze, 336 F.2d 828, 834 (3 Cir. 1964).